Supreme Court, U.S.
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No.

In The Supreme Court of The United States

ANGEL D. MORALES-VALLELLANES,
Petitioner,

v.

JOHN E. POTTER, UNITED STATES POSTMASTER GENERAL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a pro se charge to vindicate rights under 28 U.S.C. § 2000e-16, complaining among other things of continuous discriminatory acts, may describe generally the practices that form the basis of the charge, or whether, contrariwise, whether the administrative charge must be a blueprint that literally presages the subsequent litigation.

Whether the scope of the subsequent complaint filed from a charge of discrimination to vindicate rights under 28 U.S.C. § 2000e-16 can include facts that are likely or reasonably related to those contained in the EEOC charge, or reasonably could have developed from the EEOC's investigation of the charge.

Whether a verdict may be vacated because the jury heard evidence of facts that were not specifically stated in a Title VII *pro se* charge of discrimination filed with the agency, even though that evidence would qualify as background evidence in support of a timely claim.

Whether an appellate court may limit and truncate an employees charge, by assuming that the charge is the pruned summary provided by the administrative agency.

Whether the law of the case doctrine presents to an appellate court insurmountable obstacle or absolute bar to reconsideration of an issue in an earlier holding when the controlling authority had since

made a contrary decision of the law applicable to those issues.

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PETITION FOR A WRIT OF CERTIORARI

Angel David Morales-Vallellanes hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in *Morales-Vallellanes* v. *Potter*, 605 F.3d 27 (1st Cir. 2010)("*Morales II*"), vacating the jury verdict in favor of petitioner, and ordering the district Court to enter judgment as a matter of law for the government.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit is reported at, 605 F.3d 27 and is reproduced at Petitioner's Appendix ("Pet. App.") A-1–A-28. The opinion of the court of appeals denying the petition for rehearing and rehearing *en banc*, dated August 13, 2007, is reproduced at Pet. App. A-28–A-29. The opinion of the United States District Court for the District of Puerto Rico, dated August 27, 2008, is unreported and is reproduced at Appendix A-31–A-51.

JURISDICTION

The opinion and judgment of the court of appeals were issued on May 11, 2010. A timely petition for rehearing was filed, and rehearing en banc was denied on August 13, 2010. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit Court of Appeals had jurisdiction of this case on appeal, pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964, codified at 28 U.S.C. § 2000e-16(a) prohibits "any discrimination on the basis of race, color, religion, sex or national origin" in the United States Postal Service and other branches of the Federal Government. 28 U.S.C. § 2000e-16(a), Pet. App. A-86. In order for a federal employee to bring a complaint for redress of grievances under this provision, he must first file a "complaint" of discrimination before his "department, agency or unit" and then await for a "final action [..] on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a)" of 28 U.S.C. § 2000e-16.

In order to file a lawsuit in federal court, for actions taken against the employee, the lawsuit must be filed "within 90 days of receipt of notice of final action taken by a department, agency, or unit". Pet. App. A-86. Alternatively, if the department, agency or unit takes no final timely action "after one hundred and eighty days from the filing of the initial charge with the department" the employee "may file a civil action as provided in section 706 [42 U.S.C. § 2000e-5]". 28 U.S.C. § 2000e-16(c). This provision is set forth in full at Appendix A-84–A-88.

The federal-sector Title VII statute remains silent as to the definition of charge or requirements the employee must meet when he files a "complaint" or "charge of discrimination" before the department, agency or unit. However, section 717(d) makes applicable to federal sector employees, the "private sector" provisions under 706(f). 28 U.S.C. § 2000e-

16(d). In turn, Section 706(f)(1) states that:

> [i]f a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge [..] a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved.

28 U.S.C. § 2000e-5(f). Pet. App. A-79. This provision is set forth in full at Appendix A-73--A-83. In turn, subsection (b) of Section 706 lays out the only requirements of a "charge" that is to be filed before the Commission: "Charges shall be in writing under oath or affirmation and shall contain such information **and be in such form as the Commission requires**." Pet. App. A-74 (emphasis ours).

The Equal Employment Opportunity Commission has indeed established in its regulations the formal requirements of section 706(b) of Title VII, when it requires, *inter alia*, that the complaint or charge of discrimination "must be sufficiently precise to identify the aggrieved individual and the agency and to **describe generally** the action(s) or practice(s) that form the basis of the complaint." See, 29 C.F.R. § 1614.106, Pet. App. A-89 (emphasis ours).

INTRODUCTION

This case presents the question whether a complaint of discrimination brought by a federal sector employees can be curtailed and limited in scope in order to narrow causes of action as

determined by the administrative agency or unit or whether the charge includes other factual allegations made known to the administrative unit by the employee, or when the charge "generally" but not specifically, alleges the facts.

This case also considers if a Court of Appeals can rely, not on employee charges to determine whether administrative remedies are exhausted, but rather on how the Court of Appeals reads agency dismissal letters interpreting the employee's charges, in order to limit federal complaint to an agency's interpretation of those charges, excluding an entire charge from consideration, leading to the vacatur of a jury verdict because the jury heard evidence of matters excluded by the administrative interpretation of charges. Such new code pleading rules allow agency interpretations of employee charges of discrimination to be treated as demurrers that challenge the legal sufficiency of a *pro se* charges filed by the employees in administrative proceedings that promote, at least in the First Circuit, a return to the hyper-technical, code-pleading regime of a prior era, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009), or simply promote a refusal for *pro se* employees to abstain from filing administrative charges for fear of failure to plead the ultimate facts of his charge.

This case also presents the question of whether by approving such demurrers, the Court of Appeals can etch them in stone with the aid of the *law of the case* doctrine, notwithstanding that this Court's jurisprudence, following the demurrer, set a very low notice pleading standard on administrative charges of discrimination and when regulations require no

such heightened pleading standards from *pro se* participants in the filing of their complaints of discrimination, particularly when almost identical Title VII regulations only require *general* allegations on the nature of the discrimination to be communicated to the agency.

STATEMENT OF THE CASE

Petitioner Morales began his employment with the United States Postal Service ("USPS") in 1988 as a Distribution Clerk. Pet. App, A-3. In 1990, he was transferred to the USPS station in Caparra Heights, Puerto Rico. In 1995, Morales bid for and obtained the position of Distribution and Window Clerk. *Id.*

In January 1996, Morales expressed interest in an available distribution and window clerk position with Saturdays and Sundays off. Pet. App. A-55. The USPS then allegedly re-classified the position to offer only Sundays and Thursdays off so as to decrease its desirability to Morales. *Id.* Morales alleged that such reclassification was in retaliation for his involvement in previous EEO activities against the same USPS managers. On March 23, 1996, Enrique Lopez, the Caparra Heights station supervisor, issued a letter of warning to Morales for unsatisfactory performance, citing the plaintiff's "abuse of coffee breaks." *Id.* Two months later, Lopez removed Morales from his position as a Business Reply Mail Clerk, Postage Due Clerk and Express Mail Clerk, and replaced him with a female coworker. *Id.* In July 1996, tires on Morales's car were punctured on two separate occasions while the car was parked in the secured Caparra Heights station parking lot. *Id.* From that

point on, the retaliation and discrimination directed at plaintiff worsened considerably. *Id.* Morales alleged that in December 1996 he was victimized by episodes of name-calling and bullying, and later that month he was suspended one week for violating a new uniform policy instituted by Lopez. In January 1997, a postal employee poured sugar into the gas tank of Morales' car, nearly resulting in a traffic accident. *Id.* On at least three occasions in February, plaintiff's supervisor dismissed him from work without pay because "there was no work available for him." Finally, on February 20, 1997, Morales was transferred from the Caparra Heights station to the General Post Office in San Juan. *Id.* Morales alleges that he was removed from the Caparra Heights station because co-workers accused him of being "a safety hazard and a homosexual." Pet. Ap. A-56.

These events prompted Morales to file *four* Equal Employment Opportunity (EEO) complaints with the USPS. Pet. Ap. A-56. Morales filed his first precomplaint on February 15, 1996, in the aftermath of USPS's decision to alter the allotted days off for the available distribution and window clerk position. *Id.* Morales' second EEO pre-complaint, submitted April 25, 1996, alleged that a new coffee and lunch break policy instituted at the Caparra Heights station unfairly discriminated against male postal employees. *Id.* However, the very same EEO charge included a series of complaints of retaliatory harassment, including charges "of *the additional allegation* that his tires were punctured on two occasions while his car was parked in the Caparra Heights station employee parking lot." Pet. App. A-12, n. 9–A-13 (emphasis ours). The Court of Appeals,

although in a footnote in *Morales II* finally accepted in an "independent review" of that Court that Morales had indeed complained of such retaliation in his EEO charge, in *Morales I* it stripped the April 25, 1996 charge, of any such claims of physical retaliation that were indeed part of his charge.

After the USPS failed to respond to his first pre-complaint, Morales filed a formal EEO complaint on April 3, 1996, alleging that USPS unlawfully retaliated against him by posting the available window clerk position with Thursday/Sunday rest days rather than Saturday/Sunday rest days. Pet. Ap. A-57. Morales then subsequently filed a second formal EEO complaint on September 5, 1996, citing the discriminatory break policy and another episode of retaliation. *Id.* Plaintiff finally left the employ of the USPS in early September 1997, as the result of a constructive discharge. *Id.*

In 2003, Morales' claims reached the First Circuit court of appeals when it decided *Morales-Vallellanes v. Potter*, 339 F.3d 9 (1st Cir. 2003) ("*Morales I*"). The Opinion is included in its entirely in the appendix. Pet. App. A-52–A-73. In *Morales I* the court of appeals recognized that although Morales indeed had brought a "plethora of allegations" and had filed the previously mentioned charges before the Agency, it limited Morales' causes of action to "three discrete incidents" that it understood to be the subject of formal "Equal Employment Opportunity Commission".[1] Pet. App. A1–A2. As the Court held in *Morales I*:

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[1] The Court of Appeals mistakenly took the letter limiting the scope of Morales charge as an EEOC letter, when it was a letter

> We agree with USPS that *Morales' Title VII cause of action is limited to those discrimination and retaliation allegations in his amended complaint that were previously the subject of a* ***formal*** *EEO complaint.* ***As we read the EEO dismissal letters***, this universe is limited to the following three allegations:
>
> > (1) Morales's allegation that Job Bid #2541417 was posted with Thursday/Sunday rest days rather than Saturday/Sunday rest days in retaliation for plaintiff's OSHA complaints.
> >
> > (2) Morales's allegation of sexual discrimination and retaliation arising from an April 9, 1996 incident in which plaintiff's duties and responsibilities were awarded to a female employee and he was given window clerk duties to perform
> >
> > (3) Morales's allegation that the "coffee and lunch breaks" policy was not applied in an equal and nondiscriminatory matter
>
> *Morales I*, 339 F.3d at 19; Pet. Ap. 68-69 (emphasis ours).

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from the Postal Service. The EEOC never issued any letter regarding plaintiff's administrative charge since plaintiff never appealed to the EEOC but instead filed in the District Court.

As a result, the Court of Appeals, in *Morales I*, adopted the agency's interpretation[2] of Morales' "formal" charges, leaving the weaker claims for adjudication, and excluding the nefarious continuous acts of retaliatory harassment contributing to the hostile work environment, Including threats to petitioner's property and life:

> ...Morales is precluded on remand *from seeking relief* for a plethora of other acts of discrimination and retaliation alleged in his amended complaint, including the discrete acts of bullying, intimidation, and vandalism by his coworkers, his seven-day suspension for violating the USPS uniform policy, his transfer from the Caparra Heights station, his day-long "expulsions" from work in February 1997, his constructive discharge, and his internal grievances against APWU.

Pet. App. 69-70 (emphasis ours)

Morales did not appeal the Court of Appeals decision under *Morales I*. Instead, he proceeded to try the case. Morales testified at the trial, which lasted eight days. Much of his testimony and the evidence presented included testimony on including the discrete acts of bullying, intimidation, and vandalism by his coworkers. Thus, Morales told the jury about discrete acts of vandalism by his coworkers, including that they punctured his tires

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[2] See footnote 1, *supra*.

and poured sugar in his gas tank.[3] Pet. App. A-7–A-8. Morales described numerous acts of bullying and intimidation in the workplace. Pet. App. A-8. Among other things, he testified that his supervisors engaged in a campaign of harassment and retaliation by "put[ting] the employees against" him; that things became "really tense" in the office when he was investigated for some supposed death threat [he] had given to another employee;" that the "environment became extremely violent against him;" that he "started receiving threats from other employees;" and that eleven coworkers wrote a letter accusing him of "always playing games physically with other employees in events where he kisses them or touches them by massaging their backs and necks." *Id.* The letter was read into evidence. Morales also told the jury that he was suspended for seven days for violating the USPS uniform policy. *Id.* Morales testified that he was transferred from the Caparra Heights station because he "was allegedly a safety hazard and/or supposedly a homosexual." Morales's counsel questioned a former supervisor about Morales's day-long expulsions from work in February 1996, about his seven-day suspension for alleged violations of the uniform policy, and about whether Morales acted like a "homosexual man." Morales spoke at length about the emotional distress he suffered as a result of ongoing discrimination and retaliation he endured at the USPS. *Id.* Morales

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[3] Such allegations were included in plaintiff's "formal" EEO complaint, dated September 5, 1996, as was later revealed to the Court of Appeals in an "independent review" of the administrative record, by that Honorable Court. Pet. App. A-12, n. 9–A-13.

explained, "[T]he discrimination became something of everyday. I lost sleep. I spent days that I was on alert without sleeping, thinking about what new thing they're going to come up with the next day, what new thing." Pet. App. A-8–A-9. His treating physician, Dr. Hoyos, opined that Morales suffered from an adjustment disorder caused by the cumulative effect of multiple stressors in the workplace. Of the ten stressors specifically identified by Dr. Hoyos, the allegedly discriminatory coffee break policy and rotation of window duties incident, combined, were a single stressor. Pet. App. A-9.

Although the District Court allowed Morales to introduce a broad range of evidence relating to his experience at the Caparra Heights station, including evidence relating to non-formal EEO charges, the jury was instructed that it could only compensate him for the three specific incidents that we remanded. Pet. App. A-13. The verdict form filled out by the jury indicated plaintiff had proven that (1) he was intentionally discriminated against by defendant on the basis of sex or gender; (2) he was subjected by defendant to intentional discriminatory retaliation. Pet. App. A-36. The Jury awarded Morales $500,000.00 in compensatory damages. Pet. App. A-36. However, the jury form, as submitted by the parties and approved by the Court did not apportion the damages award among the specific claims. Pet. App. A-9. Later, on Morales's motion, the court awarded back pay. Pet. Ap. A-47.

The government proceeded to ask the District Court to set aside the jury verdict under Fed. R. Civ. P. 50(b). Pet. App. A-33-34. The Government reasoned, *inter alia*, that the Jury should not have

considered evidence of plaintiff's plethora of claims, but only those claims limited by *Morales I*, should have gone to the jury. Pet. App. A-36. However, the government never invoked the law of the case doctrine to preclude the admissibility of such evidence.

The District Court denied the government's motion to set aside the verdict noting, *inter alia*, that evidence pointing to OSHA retaliation was not the only evidence of retaliation brought forth to the jury, but evidence in support of plaintiff's EEO pre-complaint and subsequent formal complaint based on retaliation because of having changed the rest days of a position he was interested, was also shown to the jury, making the retaliation actionable under Title VII, since evidence of EEO and OSHA based retaliation were "comingled" Pet. App. A-38–39.

The Government also argued in its motion to set aside the verdict, that *Morales I* precluded any finding of constructive discharge, since given the remand prohibiting relief on all but the three causes of action recognized by the Court of Appeals in *Morales I*, precluded any finding of severity required by any constructive discharge. Pet. App. A–40. The District Court rejected that argument stating that both parties agreed to the verdict form in which equitable relief was among the available remedies, and the remedies of front pay and back pay could have been delivered on those grounds. Pet. App. A-40. For the most part, the District Court denied the government's request for new trial and for judgment as a matter of law. App. Pet. A-50–A-51.

The government appealed and the case was reviewed again before the Court of Appeals in *Morales-Vallellanes* v. *Potter*, 605 F.3d 27 (1st Cir. 2010) (hereinafter "Morales II") the Court of Appeals vacated the verdict and ordered the district court on remand to enter judgment as a matter of law for the government. Pet. App. A-25.

The Court of Appeals reasoned that *vacatur* with order of dismissal on remand was proper *because* of its order in *Morales I* limiting the claims to the three incidents were "the law of the case." and relied on Circuit Precedents determine that the evidence of other acts beyond the scope of the "formal charge" should be precluded. Pet. App. A-12, citing *United States v. Vigneau*, 337 F.3d 62, 67 (1st Cir. 2003)("law of the case" doctrine is a "prudential principle that 'precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided'"); *see also, United States v. Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir. 1991) ("When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand." (emphasis in original)). The Court of Appeals also found that any argument to exempt Morales from the law of the case as stated in *Morales I*, was brought for the first time in Morales' opposition to Potter's cross-appeal, to broaden the scope of the claims precluded by *Morales I*. In so reasoning, the Court of Appeals admits in a footnote to *Morales II* that an independent review of the administrative record "revealed that *Morales did, in fact, include in a formal complaint the additional allegation* that his tires were punctured on two

occasions while his car was parked in the Caparra Heights station employee parking lot." Pet. App. A-12, n. 9–A-13 (emphasis ours). Furthermore, in *Morales II* the Court of Appeals admitted that the government, at trial Potter "routinely failed to object at trial", introduction of evidence unrelated to the limited issues of *Morales I.* See, Pet. App. A-14, n. 11. In fact it was not until the filing of the government's reply brief, that for the first time the law of the case doctrine was invoked on appeal, and to which Morales quickly opposed.

The Court of Appeal's reasoning in *Morales I* to restrict the scope to plaintiffs claim to 3 out of 4 "formal" charges, and exclude the "formal" charge of retaliation, was to stress that Morales' retaliation claim was not a hostile work environment claim, the sole exception to refilling charges on grounds of a continuous violation encompassed in such claims. When the Court of Appeals decided *Morales I* in 2003, this Court had just decided *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110-11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). In *Morgan*, this court distinguished between "discrete acts" of discrimination, *vis à vis* continuous acts involving hostile work environment claims. *Morgan*, 536 U.S. 110-11. That explains why *Morales I*, describes plaintiff's EEO-limited "charges" as "discrete acts" even though the following acts over which testimony was heard by the Jury were, according to *Morales I*, precluded on remand: "including the discrete acts of bullying, intimidation, and vandalism by his coworkers, his seven-day suspension for violating the USPS uniform policy, his transfer from the Caparra Heights station, his day-long "expulsions" from

working February 1997," Pet. App. A-70. Thus, it explains why the Court of Appeals insisted in construing Morales' hostile work environment claims resulting from "discrete acts" of retaliation. The prenominal qualifier "discrete" is used numerous times throughout the Court of Appeals opinions to erect discontinuous gaps or barriers between each act, as if they were not related to one same act of retaliatory harassment. Pet. App. A-1, A-6, A-8, A-15, A-60. However, what the Court of Appeals did not mention in *Morales I* and *Morales II* was that *Morgan* also stood for the exception that "a charge alleging a hostile work environment claim [..] will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Morgan*, at 122. When one looks at the "plethora" of evidence introduced by Morales at trial, one notes that they are mostly related to his hostile work environment claim. More specifically in his charge of September 5, 2006, which was ignored in *Morales I* and "independently reviewed" by the Court of Appeals in *Morales II*. Morales claims, he was persecuted among other things because, his tires in the secured USPS parking lot were punctured twice, fellow employees were summoned and told that the would all be punished because of Morales' EEO complaint; as a result employees blamed Morales for the collective action against them; other employees were warned not to speak with Morales, and they did not; Morales was stripped of his regular functions. The Court of appeals only mentions the tire incident, as a "discrete" and therefore isolated incident, and

not as describing a hostile work environment in which it was nested.

It was under this scenario, in which other "formal charges were filed by Morales", that the Court of Appeals, instead of taking exception to the law of the case doctrine, given the clear error of its previous limitation to three remedies, when in fact there had been formal and informal charges alleging other retaliatory acts, the Court of Appeals left the law of the case unaltered without departures and then proceeded to explain why the Jury was not to be presumed correct, and instead replaced the jury verdict with its own judgment on each of the claims. Pet. App. A-14–A-25.

In a nutshell, the Court of Appeals relied on this Court's objective standard of retaliation in *Burlington N. & Santa Fe Ry. v. White,* 548 U.S. 53, 61-62, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)("An "adverse employment action" is one that "affect[s] employment or alter[s] the conditions of the workplace," to determine that no reasonable juror was correct in his consideration of three claims before the Court, as limited by the Court and by the agency's EEO to three out of four "formal" charges of retaliation.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below is contrary or contradictory with the Decision of this Court in *Federal Express v. Hollowecki,* 552 U.S. 389, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008), in that it imposes on charge in violation of a nearly identical statute, Title VII, a

heightened pleading standard in the filing of *pro se* charges of discrimination.

The Court should also grant the Petition because it conflicts with the precedents of four sister circuits to the Court of Appeals below. Those circuit, have recognized, as does the Title VII regulations by the EEOC, that charges are only to generally allege discriminatory acts, and that exact wording of the charge of discrimination need not presage the judicial pleadings which may follow. The rule under those circuits, as once was the rule of the First Circuit until *Morales II*, allow the claims in a Title VII civil complaint to be those that come within the scope of the EEOC investigation. The scope of that investigation, in turn, is all the claims which can reasonably be expected to grow out of the charge of discrimination, and not the exact wording of the charge.

Finally, the Court should grant the petition because it controls an important issue of Federal Law, namely, whether a form of code-pleading is to be imposed on *pro se* filers of charges of discrimination under title VII.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *FEDERAL EXPRESS CORP. v. HOLOWECKI*, AND OTHER DOCTRINES OF THIS COURT

In *Federal Express v. Hollowecki*, 552 U.S. 389, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008), this Court

examined the requirements of a charge under the Age Discrimination in Employment Act (ADEA). More specifically it examined the language in the EEOC's ADEA regulations at 29 C.F.R. § 1626.8 and 29 C.F.R. § 1626.6. As we see it, the definitions of a "charge" under the ADEA regulations and the same definition under the Title VII regulations defining charge, make the requirements equivalent. Those requirements in turn, determine the scope of the charge, as required of *pro se* employees that avail themselves to the procedures.

In one sense, the ADEA regulations are in some aspects *more demanding* than the Title VII requirements of a charge, such as petitioner's, since 29 C.F.R. § 1626.8(a) contains five pieces of information that an ADEA charge "should contain". Included among them was the requirement for "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1626.8(a)(3).

However, in another interpretation of the regulations, the ADEA regulations state that a charge was sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of 29 C.F.R. § 1626.6. *See,* 29 C.F.R. § 1626.8(b). Section 1626.6, in turn reads: "A charge shall be in writing and shall name the prospective respondent and shall *generally allege the discriminatory act(s).*"

Given the inconsistencies between the regulatory provisions, where in one a *charge* "should contain" "clear and concise" statements of fact, while at the same time the charge need only to generally allege

discriminatory acts. The Court, took a moderate interpretation of a *charge* as a filing where, "taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." *Holowecki*, at 398.

In contrast to the ADEA's definition of charge, Title VII clearly defines the charge as a written communication that, in addition to identifying the persons responsible, merely "**describe generally the action(s) or practice(s) that form the basis of the complaint.**" See, 29 C.F.R. § § 1614.106. The only difference in the requirements of the definition of charge under 29 C.F.R. § 1626.6 for the ADEA and the Title VII requirements in 29 C.F.R. § § 1614.106 is that they Title VII charge must be made under affirmation or oath. However, in *Edelman v. Lynchburg College*, 535 U.S. 106, 112-113, 122 S.Ct. 1145, 152 L. Edel. 2d 188 (2002), this Court rejected the argument that a charge is not a charge until the filer satisfies Title VII's oath or affirmation requirement. As such, the ADEA and Title VII definitions pertaining to the scope of a charge are equivalent.

We are aware that under *Holowecki* the Court cautioned that "employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination," 128 S.Ct. at 1153, we believe, however that we have indeed applied the rules applicable to teach each statute and regulatory scheme separately to each statute and the same principles and conclusions of *Holowecki* apply to this Title VII case. The similarities explain why numerous courts have already applied *Holowecki* in

the Title VII context because of the similarities between the statutory schemes of the ADEA and Title VII concerning exhaustion of administrative remedies. See e.g. *Barzanty v. Verizon Pa., Inc.*, 361 Fed. Appx. 411, 415 (3d Cir. 2010) (unpublished opinion applying *Holowecki* to Title VII intake questionnaire); *Evenson v. Sprint/United Mgt. Co.*, 2008 U.S. Dist. LEXIS 65661, 2008 WL 4107524 at *6 (N.D. Tex. Aug. 21, 2008) (explaining that "[t]he exhaustion of administrative remedies requirement under the ADEA is nearly identical to that of Title VII"); *Beckham v. National R.R. Passenger Corp.*, 590 F. Supp. 2d 82, 86 (D.D.C. 2008); *Grice v. Baltimore County*, 2008 U.S. Dist. LEXIS 91114, 2008 WL 4849322 at *4 n. 3 (unpublished opinion, D. Md. Nov. 5, 2008); *Palmer v. Southwest Airlines Co.*, 2009 U.S. Dist. LEXIS 98971, 13-14 (unpublished opinion, N.D. Ill. Oct. 23, 2009).

Hollowecki also recognized that the more "permissive standard" for "charge" as set both by the ADEA and Title VII, was to set up a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Holowecki* at 402-403; quoting *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988).

In the context of *Hollowecki*, the Court of Appeals below imposed a more restrictive standard on Title VII, to the regulatory standard applied to ADEA charges. It did so through the adoption of code pleading requirements on a Title VII charge, where "formal charges" of discrimination are required, and those charges are in turn interpreted by the agency's EEO and federal complaints are restricted to such

limiting interpretations, the First Circuit has adopted a code pleading standard on Title VII charges, even if the regulations only require the pro se grievant to "generally allege" the action or practice that forms the basis of the complaint.

Little would the *pro se* grievant under *Morales II* know that if he does not describe all the detailed facts related to his charge in a "formal charge" he cannot raise them later in his complaint and is forever barred from raising any evidence at trial that was not specifically recited in his sworn formal charge. Morales II turns *Hollowecki* on its head by imposing a code pleading standard on agency grievances, and more specifically runs afoul of the fact that a charge, under Title VII must only "*generally allege the discriminatory act(s)*" 29 C.F.R. § § 1614.106.

Finally, in placing much emphasis on the law of the case doctrine, without considering the particular charges of this case and not considering the changed landmark of the *Holowecki* ruling, two years before and the First Circuits's own ruling in 2009, the decision is at odds with the exceptions to the *law of the case* doctrine.

The law of the case doctrine cannot pose an insurmountable obstacle to this Court's review of *Morales II* and to the Court of Appeals review of *Morales I.* The doctrine "is neither an absolute bar to reconsideration nor a limitation on a federal court's power. *United States v. Rivera-Martinez*, 931 F.2d 148, 150-151 (1991). The doctrine is not a "straitjacket for a court". *Morgan v. Burke*, 926 F.2d

86, 91 (1st Cir. 1991). On the contrary, the law of the case doctrine[4]

> simply 'expresses' common judicial 'practice'; it does not "limit" the courts' power. *See Messenger v. Anderson*, 225 U.S. 436, 444, 56 L.Ed. 1152, 32 S.Ct. 739 (1912) (Holmes, J.). It cannot prohibit a court from disregarding an earlier holding in an appropriate case which, for the reasons set forth, we find this case to be.

Castro v. United States, 540 U.S. 375, 384 (2003).

Moreover, the doctrine of law of the case comes into play only with respect to issues previously determined. *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895). The doctrine allows a District Court to "consider and decide any matters left open by the mandate" of the higher court. *Id.*, at 256.

In *Morales I*, the Court of Appeals only precluded plaintiff from "*from seeking relief* for a plethora of other acts". Pet. App. 69-70. *Morales I*, did not prevent Morales from presenting evidence of the plethora of other acts. "'While a mandate is controlling as to matters within its compass, on the

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[4] Although the Court of Appeals states correctly that Morales addressed the issue of the law of the case for the first time in its reply to the government's cross appeal, it is also true that such defense was never raised prior to that filing. Once it was raised, it was addressed by Morales, although not with the same arguments as here. The defense was also addressed later in Morales' petition for rehearing *en banc*.

remand a lower court is free as to other issues.'", *Quern v. Jordan*, 440 U.S. 332, 348 (1979) quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939).

Not only was the District Court free to allow evidence of the plethora of other incidents of the hostile work environment affecting Morales, but this Court, in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), held that even if that plethora of acts were construed as discrete acts and not as continuous acts, title VII did not "bar an employee from using the prior acts as background evidence in support of a timely claim." *Morgan*, 536 U.S. 101, 113. Thus, clearly, the decision in *Morales II* to vacate the judgment on grounds that the jury heard the plethora of other acts is an exception to the law of he case doctrine, inasmuch as the law of the case, to the extend that it forbade any presentation of the plethora of other evidence was "clearly erroneous and would work a manifest injustice." *Rivera-Martinez*, 931 F.2d at 151.

To the extent the law of the case, in *Morales I*, served as a limit to plaintiff's claims of hostile work environment, we also believe there is no straightjacket to be applied. This Court's opinion in *Hollowecki* was decided after *Morales I*. *Morales I* was also followed by the decision of *Fantini v. Salem State College*, 557 F.3d 22, 27 (1st Cir. 2009),[5] *Morales I*, after *Fantini* and before *Morales II*, was no longer controlling. The "controlling authority ha[d] since [*Morales I*] made a contrary decision of

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[5] A discussion as to the implications of *Fantini* on *Morales I* is discussed in Section II, *infra*.

the law applicable to such issues". *Rivera-Martinez*, 931 F.2d at 151. More specifically, two years prior to *Morales II* and well after *Morales I*, *Hollowecki* expanded the definition of "charge" for the nearly identical ADEA statute, and made implausible the *Morales I* requirements on "formal charges" that could not "generally allege" the retaliatory activities, but rather had to detail the "plethora" of facts over which he would testify. At the time *Morales II* was entered into the docket the withering away of such ultra technical code-pleading formalisms were stripped by this Court in *Hollowecki* and *Fantini* it would certain be work a manifest injustice, not only to Morales, but to the jury, to apply the law of the case in *Morales II*.

II. THE DECISION BELOW IS AT ODDS WITH THE RULING OF THE FOURTH, FIFTH, SEVENTH AND NINTH CIRCUITS.

The First Circuit opinion, limiting plaintiffs evidence at trial and his claims for relief to those fact as they appear in defendant's EEO's view of the charges, moves away from, and is clearly contrary or contradictory with, the holdings of other circuits involving determinations as to whether the allegations of Title VII complaints limit the judicial claims of the employee to the literal allegations in the charge, or in the agencies view of the charge, or whether those allegations can also include facts reasonable related to the facts of the employees charge, yet not spelled out, *ad verbatim*, in the charge.

More specifically, after this Court laid out its opinion in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), several circuits decided that in order to determine whether the allegations of the complaint fall within the scope of the earlier charges, the Courts of Appeals would look at whether the claims are likely or reasonably related to those contained in the EEOC charge. If they are, the court then asks whether the current claim *reasonably could have developed* from the EEOC's investigation of the charges before it or *is reasonably related to* those charges. *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009). ("Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit."); *Chacko v. Patuxent Inst.*, 429 F.3d 505, 506 (4th Cir. 2005); *Pacheco v. Mineta*, 448 F.3d 783, 788 (5th Cir. 2006); *Geldon v. South Milwaukee Sch. Dist.*, 414 F.3d 817 (7th Cir. 2005); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099-1100 (9th Cir. 2002).

Not only can *Morales I* and *Morales II* be reconciled with these opinions, but it is also inconsistent with a 2009 First Circuit opinion consistent with the "reasonably developed" and "reasonably related" rules of the other circuits. *Fantini v. Salem State College*, 557 F.3d 22, 27 (1st Cir. 2009). The First Circuit has now departed *Fantini*, and its sister circuits, when it espoused the very same principles it denied petitioner in *Morales*

II, and such departure cannot to terms with those circuits, nor with its earlier opinion stating that

> [a]n administrative charge is not a blueprint for the litigation to follow. Thus, 'the exact wording of the charge of discrimination need not 'presage with literary exactitude the judicial pleadings which may follow." Rather, the critical question is whether the claims set forth in the civil complaint come within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'

Fantini, 557 F.3d at 27, quoting, *Powers v. Grinnell Corp.*, 915 F. 2d 34, 38-39 (1st Cir. 1990) (citations omitted).

III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

If the opinion below stands, under the First Circuit, a federal court will be able to take the agency's interpretation of plaintiff's charge, without reading that charge, and determine that such truncated interpretations limit, not only the claims at trial, but the evidence that may be presented to the Jury. The literal "formal charge", or at least the way the EEO office at the Agency views it, could doom a pro se filer's case from the very same day he files the "formal charge" before the agency, since, whatever the EEO office at the Agency determines the complaint to be, would be viewed by the appellate

court as limiting not only the available relief, but also would limit the available evidence at trial, without any need to resort to *Iqbal* or other doctrines applicable to heightened pleadings in federal courts. Under *Morales II*, plaintiff is no longer "the master of his complaint". *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-399 (1987). It is *the agency*, and the court of appeals, who may now limit and edit her pleadings beforehand, when she is, *pro se*, seeking assistances using Congress' remedial schemes. Those masters of her complaint now can choose the claims for her. This "strong" exhaustion requirement, as stated in *Morales I* and later expanded in *Morales II* to cover the rules of evidence at trials, does not run in the opposite direction of the previously cited precedents of the Fourth, Fifth, Seventh and Ninth Circuits. Those circuits have reiterated prior rules allowing the scope of the federal complaint not only to encompass facts stated in the charge (or in the employers formulation of the charge), but is also inconsistent with *Morgan* itself.

It is precisely the scope of the exhaustion requirement what required the *Hollowecki* court to define "charge", not only for timing requirement, but for substantive purposes as well, since the scope of exhaustion is defined in light of two the competing Title VII policies that it furthers. The provisions of Title VII were not designed for the sophisticated, and most complaints, such as four filed in the case here, are initiated *pro se*:

> Title VII, sets up a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process."

> *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988); see also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979) (noting the "common purpose" of Title VII and the ADEA). The system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes. It thus is consistent with the purposes of the Act that a charge can be a form, easy to complete, or an informal document, easy to draft. The agency's proposed test implements these purposes.

Holowecki, 552 U.S. at 402-403.

The case goes to the very nature of the ability of those laypersons to claim their federal rights in what has been the landmark legislation and showcase to the world: the Civil Rights Act of 1964. If code pleading is to be adopted, as in *Morales II*, an individual with no knowledge of *waiver* and code pleading rules would either avoid using the procedures required to vindicate his rights, or would either have to resort to counsel and engage in formal pleadings that were not envisioned by Congress in the purposes behind the passage of Title IV, for simply avoid the investigatory and conciliatory procedures of the EEOC and attempt to obtain voluntary compliance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ANGEL DAVID MORALES-VALLELLANES, Plaintiff-Appellant/Cross-Appellee, v. JOHN E. POTTER, UNITED STATES POSTMASTER GENERAL, Defendant-Appellee/Cross-Appellant.

Nos. 08-2346, 08-2452

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

605 F.3d 27 [*]

May 11, 2010, Decided

Before Torruella, Circuit Judge, Baldock,* Senior Circuit Judge, and Howard, Circuit Judge.

TORRUELLA, *Circuit Judge.* Plaintiff-appellant/cross-appellee Angel David Morales-Vallellanes ("Morales") obtained a jury verdict in his favor on claims under Title VII alleging discrimination and retaliation by his former employer, John E. Potter, the United States Postmaster General ("Potter"). In a prior appeal, we limited Morales to pursuing claims based on three discrete incidents that were previously the subject of formal Equal Employment Opportunity Commission (EEOC) complaints, and expressly precluded him

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* Of the Tenth Circuit, sitting by designation.

from seeking relief for a "plethora" of other allegations raised for the first time in the district court. *See Morales-Vallellanes v. Potter, 339 F.3d 9, 19 (1st Cir. 2003)* [hereinafter "*Morales I*"]. Despite this limitation, the evidence presented at trial included numerous allegations of discrimination and retaliation that were well beyond the scope of our limited remand. Nonetheless, the jury was instructed that Morales could only recover for his claims based on the three specific allegations addressed in the prior appeal. On December 21, 2007, the jury returned a $ 500,000 lump-sum verdict in his favor, which was later reduced by way of statutory cap to $ 300,000. *See 42 U.S.C. § 1981a (b)(3)(D).* The trial court awarded an additional $ 64,504 in back pay.

Morales brought this appeal to challenge the sufficiency of the trial court's back pay award, as well as its decision denying him front pay. On cross appeal, Potter contends that the jury verdict cannot stand because Morales failed to prove that he suffered any materially adverse employment action capable of supporting his claims under Title VII. Potter also challenges the jury's damages award as grossly excessive and based on evidence that we previously excluded; contends that Morales was not entitled to back pay; and in various ways opposes Morales's contentions that his damages award was inadequate.

After careful consideration, we conclude as a matter of law that Morales has failed to prove that he suffered any material adverse employment action within the meaning of Title VII's discrimination or retaliation provisions. We therefore vacate the jury

verdict and remand with instructions to enter judgment in Potter's favor.

I. *Background*

A. Facts [1]

We sketch only the basic facts essential to this appeal. Morales began his employment with the United States Postal Service ("USPS") in 1988 as a Distribution Clerk. In 1990, he was transferred to the USPS station in Caparra Heights, Puerto Rico. In 1995, Morales bid for and obtained the position of Distribution and Window Clerk. In this capacity, Morales typically performed back-office "distribution" duties, which included "business reply," "express mail," and "postage due" functions. Because Morales worked the early shift and had an arm injury that limited the tasks he could perform without pain, Morales rarely performed "window" duties, which included customer interactions; nonetheless, he was trained to do so, did so on occasion, and those tasks were part of the job description he had bid for.

Beginning in approximately early 1996, Morales lodged several complaints with the Occupational Safety and Health Administration (OSHA) regarding dust accumulation, rodent infestation, and general unsanitary conditions at the Caparra Heights station. Eventually, OSHA conducted a formal inspection and issued the USPS citations for various safety and health violations. Around the same time, Morales also filed unrelated, employment-based complaints with the EEOC. Morales alleged that his

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[1] Additional detail regarding Morales's allegations can be found in our prior opinion. *See Morales I, 339 F.3d at 12-14.*

supervisors and coworkers began to take various retaliatory actions against him for filing these complaints, and to discriminate against him on account of his gender. Only three such actions are relevant to this appeal.

First, in January 1996 Morales expressed interest in bidding for a Distribution and Window Clerk position that was expected to come with Saturdays and Sundays off, a coveted position given that many USPS employees had an irregular weekend schedule.[2] Thereafter, the USPS reclassified the position so that, when it was posted, it came with Thursdays and Sundays off instead. On February 15, 1996, Morales filed a precomplaint with the EEOC alleging that this reclassification was in retaliation for various complaints he had filed, including with the EEOC.[3] He alleged that the reclassification was intended to dissuade him from bidding for the position.

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[2] At the time, Morales had Sundays and Mondays off. Morales testified that at some point in 1996, he was given Saturday and Sundays off instead.

[3] The EEO complaint process provides an administrative forum for postal employees to resolve discrimination claims against the USPS. Postal workers alleging discrimination are required to file a "precomplaint" and consult with an EEO counselor. If the matter raised in the precomplaint is not resolved within the established 30-day counseling period, the employee is authorized to file a formal EEO complaint. Once the formal complaint is filed, USPS is compelled to take action within a specified time period. After this period expires, the employee is permitted to file suit in United States District Court.

Morales I, 339 F.3d at 13.

Second, on March 23, 1996 Morales's supervisor issued him a letter of warning for unsatisfactory performance due to an "abuse of coffee breaks," which was withdrawn from his personnel file about a week later. On April 25, 1996, Morales filed a second precomplaint with the EEOC alleging that a new coffee and lunch break policy at the Caparra Heights station unlawfully discriminated against male employees. Specifically, he complained that a female employee, Mayra Irene, was allowed to take longer breaks than permitted under the policy, while male employees were not. He also alleged that on one occasion, his supervisor took Mayra Irene and another female administrative employee out to lunch, but returned late in violation of the policy.

Third, on April 9, 1996[4] Morales's business reply mail, postage due, and express mail duties were temporarily reassigned to a female employee, again Mayra Irene, while he was given "window" duties to perform. Morales complained to the EEOC regarding this rotation of responsibilities, alleging that it was discriminatory and in retaliation for his previous complaints.

All three incidents were the subject of formal EEOC complaints which made their way through the administrative process, and were ultimately dismissed. *See Morales I, 339 F.3d at 18.*

B. Proceedings Below

In 1997 Morales brought suit in the district court alleging that USPS officials had retaliated against

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[4] Contrary to his initial allegations, Morales testified that this incident may have occurred in May 1996.

him for his various EEOC complaints and had discriminated against him on the basis of his gender; that the USPS and Postal Workers Union officials breached their obligations under a collective bargaining agreement ("CBA"); and that he suffered an intentional infliction of emotional distress at defendant's hands. The district court granted summary judgment in Potter's favor on all claims.

In *Morales I*, we affirmed the district court in most respects, but disagreed with its conclusion that the acts of discrimination and retaliation Morales had alleged as violations of the CBA were not actionable under Title VII. We determined, however, that many of the allegations of harassment and retaliation Morales relied on to support his federal claims had never been the subject of a formal complaint to the EEOC, and were therefore barred by Title VII's administrative exhaustion requirement. Accordingly, we remanded for the limited purpose of considering Morales's allegations of discrimination and retaliation arising out of the three incidents described above, which were addressed in the EEOC dismissal letters. Because no court had analyzed Morales's claims based on these events under the Title VII rubric, we declined to independently undertake that assessment and instead left that task to the district court in the first instance. We instructed as follows:

> Morales is precluded on remand from seeking relief for a plethora of other acts of discrimination and retaliation alleged in his amended complaint, including the discrete acts of bullying, intimidation, and

> vandalism by his co-workers, his seven-day suspension for violating the USPS uniform policy, his transfer from the Caparra Heights station, his day-long "expulsions" from work in February 1997, his constructive discharge, and his internal grievances against [the Postal Workers Union].

Morales I, 339 F.3d at 19.[5]

Following our remand, the defendants moved for summary judgment on the theory that Morales's remaining allegations failed as a matter of law to rise to the level of retaliation or discrimination within the meaning of Title VII, but the district court denied the motion in a margin order, which specified that the trial would be "limited to the three issues which survived appeal."[6] Thereafter, the case was referred to a magistrate judge for trial, *see 28 U.S.C. § 636*, who, in a series of pre-trial orders, made it clear that the evidence presented at trial, and the claims submitted to the jury, would be limited to the three specific incidents identified in our prior opinion.

Morales testified at the trial, which lasted eight days. Much of his testimony and the evidence presented veered well beyond the clear lines drawn in our prior opinion and the trial court's various

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[5] Morales moved for panel reconsideration, which was denied.

[6] The district court did not address the merits of Potter's legal challenge, concluding instead that whether Morales suffered actionable discrimination or retaliation "involve[d] factual issues, as well as matters of credibility and weight of the evidence."

orders. Thus, Morales told the jury about discrete acts of vandalism by his coworkers, including that they punctured his tires and poured sugar in his gas tank.

He described numerous acts of bullying and intimidation in the workplace. Among other things, he testified that his supervisors engaged in a campaign of harassment and retaliation by "put[ting] the employees against" him; that things became "really tense" in the office when he was investigated "for some supposed death threat [he] had given to another employee;" that the "environment became extremely violent against him;" that he "started receiving threats from other employees;" and that eleven coworkers wrote a letter accusing him of "always playing games physically with other employees in events where he kisses them or touches them by massaging their backs and necks." The letter was read into evidence.

Morales also told the jury that he was suspended for seven days for violating the USPS uniform policy. He testified that he was transferred from the Caparra Heights station because he "was allegedly a safety hazard and/or supposedly a homosexual." Morales's counsel questioned a former supervisor about Morales's day-long expulsions from work in February 1996, about his seven-day suspension for alleged violations of the uniform policy, and about whether Morales acted like a "homosexual man."

Morales spoke at length about the emotional distress he suffered as a result of ongoing discrimination and retaliation he endured at the USPS. He explained, "[T]he discrimination became

something of everyday. I lost sleep. I spent days that I was on alert without sleeping, thinking about what new thing they're going to come up with the next day, what new thing." His treating physician, Dr. Hoyos, opined that Morales suffered from an adjustment disorder caused by the cumulative effect of multiple stressors in the workplace. Of the ten stressors specifically identified by Dr. Hoyos, the allegedly discriminatory coffee break policy and rotation of window duties incident, combined, were a single stressor. The altered job posting was not identified as contributing to Morales's adjustment disorder.

In its charge, the trial court instructed the jury that it could only compensate Morales for the three specific incidents identified in our prior opinion. The verdict form which the jury returned indicated generally that it had found Potter liable for both discrimination and retaliation, but it did not apportion the damages award among the specific claims. Later, on Morales's motion, the court awarded back pay -- offset by the amount of disability payments plaintiff had been receiving since 1997, when Morales began to collect disability payments[7] -- and denied his request for front pay.

Both parties filed post-trial motions. Morales challenged the court's back pay award as too low, as well as its denial of his motion seeking front pay. Potter filed motions for judgment as a matter of law

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[7] Since that time, Morales has received approximately 66.33% of his USPS salary through the U.S. Department of Labor's Workers' Compensation Program. He technically remains a USPS employee.

on account of Morales's alleged failure to prove actionable discrimination or retaliation; for remittitur or, in the alternative, a new damages trial; and challenging the back pay award. *See Fed. R. Civ. P. 50, 59(a), (e).* The district court denied Potter's motions, but granted in part Morales's motion seeking additional back pay due to a computational error in the original judgment. Both parties filed timely appeals.

II. *Discussion*

A. Standard of Review

We review *de novo* the district court's denial of a defendant's motion for judgment as a matter of law. *Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 57 (1st Cir. 2005).* Potter's primary challenge focuses on the legal sufficiency of Morales's claims alleging discrimination and retaliation. He contends Morales has failed to prove that he suffered any materially "adverse employment action." Often, whether an employee has suffered a materially adverse employment action capable of supporting claims under Title VII is a question of law for the court. *See Bergeron v. Cabral, 560 F.3d 1, 6 n.1 (1st Cir. 2009)*(explaining that "the adversity vel non of that action is a legal question"); *DeNovellis v. Shalala, 124 F.3d 298, 312 (1st Cir. 1997)*(characterizing as a "legal question" whether plaintiff's "sham assignment constituted an adverse employment action within the meaning of Title VII").[8] In this analysis, we assume that the

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[8] With respect to Morales's claims of retaliation, we are mindful that "the significance of any given act of retaliation will often

motivation for the employer's acts was discriminatory or retaliatory, and look only to the statutory significance of the harm these acts caused. *Cf. Burlington Northern, 548 U.S. at 70.*

B. The Scope of the Claims

As a threshold matter, the parties dispute the scope of the claims under review. Potter maintains that the claims are limited to the three incidents described in our prior opinion, while Morales asserts that, for various reasons, the claims submitted to the jury encompassed all of the "plethora" of unexhausted allegations which we excluded in the first appeal. One problem with Morales's argument is that the trial court's orders in limine, instructions to

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depend upon the particular circumstances" of each case. *Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)*("Context matters."); *see also Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)*("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."). Thus, we review the factual circumstances bearing on the legal significance of these actions in the light most favorable to the verdict. *Cf. Bergeron, 560 F.3d at 6 n.1* (noting that "the existence of an adverse employment action may be a question for the jury when there is a dispute concerning the manner in which the action taken affected the plaintiff-employee"(citing *Rivera-Jimenez v. Pierluisi, 362 F.3d 87, 94 (1st Cir. 2004)*); *see also Granfield v. CSX Transp.,Inc., 597 F.3d 474, 2010 U.S. App. LEXIS 5299, at *15 (1st Cir. Mar. 12, 2010)*(in considering the denial of a party's motion for judgment as a matter of law, appellate courts "examine the evidence presented to the jury, and all reasonable inferences that may be drawn from such evidence, in the light most favorable to the jury verdict").

the jury, and discussion of Morales's claims in its post-trial order were all consistent with the limitation in our prior opinion. Though Morales contends that the district court ultimately agreed with his reading of the scope of the claims, he has identified nothing in the record to support that assertion.

Another problem with Morales's contention is that our holding in *Morales I* limiting his claims to the three incidents we have described is "the law of the case." *See, e.g., United States v. Vigneau, 337 F.3d 62, 67 (1st Cir. 2003)*("law of the case" doctrine is a "prudential principle that 'precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided'"); *see also United States v. Rivera-Martinez, 931 F.2d 148, 150 (1st Cir. 1991)* ("When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand." (emphasis in original)). We have recognized limited exceptions to the application of this doctrine, *see Vigneau, 337 F.3d at 68*, but Morales never argued to the trial court that any of these limited exceptions should apply, and he does not do so here. This failure to confront the implications of our prior holding essentially forecloses Morales's attempt, raised for the first time in his opposition to Potter's cross-appeal, to broaden the scope of the claims now under review.[9]

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[9] In any event, Morales's various contentions lack merit. Our independent review of Morales's submissions to the EEOC reveal that Morales did, in fact, include in a formal complaint the additional allegation that his tires were punctured on two occasions while his car was parked in the Caparra Heights

Thus, while the trial court may have allowed Morales to introduce a broad range of evidence relating to his experience at the Caparra Heights station, including evidence relating to his excluded allegations, the jury was instructed that it could only compensate him for the three specific incidents that we remanded.[10] "A basic premise of our jury system

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station employee parking lot. At the trial, Morales put into evidence a sworn declaration from a co-worker, Samuel Cora-Rivera, which stated that Cora-Rivera had heard that Morales's tires were punctured by a Caparra Heights supervisor as an act of retaliation. On that basis, Morales misleadingly asserts that, because these incidents were included in a formal EEOC complaint and were proven to be retaliatory, we should consider these acts "adverse employment actions" for purposes of his retaliation claim. Morales fails to point out, however, that Cora-Rivera testified at the trial and unambiguously retracted his statements in the declaration, stating that "[a]ll of the paragraphs [in the sworn statement] are not true." We do not consider this incident in our analysis of Morales's Title VII claims.

[10] The jury instructions provided, in relevant part:

> Pursuant to the Opinion of the Court of Appeals for the First Circuit . . ., plaintiff Morales's Title VII cause of action is limited to those discrimination and retaliation allegations in his amended complaint that were previously the subject of a formal EEO complaint, to wit;
>
> 1. Morales' allegation that Job Bid # 2541417 was posted with Thursday/Sunday rest days rather than Saturday/Sunday rest days in retaliation for plaintiff's OSHA complaints;
>
> 2. Morales allegation of sexual discrimination and retaliation arising on April 9, 1996 incident [sic] in which plaintiff's duties and responsibilities

is that the jury follows the court's instructions," and therefore we assume, as we must, that the jury acted according to its charge. *Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am., Inc., 932 F.2d 37, 40 (1st Cir. 1991).* Accordingly, we proceed to assess the legal sufficiency of only those claims actually submitted to the jury.[11]

1. Discrimination

Title VII provides that "[a]ll personnel actions" affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-16(a).* In order to present a legally viable claim of employment discrimination under the statute, a plaintiff must show, among other things, that he suffered an "adverse employment action" on account of a protected ground. *Garcia v. Bristol-Myers Squibb Co.,*

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were awarded to a female employee and he was given window clerk duties to perform;

3. Morales' allegation that the 'coffee and lunch break's policy' was not applied in an equal and nondiscriminatory manner.

*See also Morales-Vallellanes v. U.S. Postal Serv., No. 97-2459, 2008 U.S. Dist. LEXIS 113497, *14-15 (D.P.R. Aug. 27, 2008)*(post-trial order discussing limitations on claims submitted to the jury).

[11] We acknowledge that, with respect to the admission of evidence, it appears that the trial court was inexplicably lax in its enforcement of its pre-trial orders, and Potter routinely failed to object at trial. Nonetheless, contrary to Morales's contentions, we do not agree that Potter is therefore estopped from asserting that the jury award was limited to the three incidents we remanded, which were clearly delineated in the pre-trial orders and instructions to the jury.

535 F.3d 23, 31 (1st Cir. 2008); *see also George v. Leavitt, 407 F.3d 405, 411, 366 U.S. App. D.C. 11 (D.C. Cir. 2005)* (explaining that "Title VII places the same restrictions on federal [employers] as it does on private employers, and so we may construe the latter provision in terms of the former" (internal quotation marks omitted)). An "adverse employment action" is one that "affect[s] employment or alter[s] the conditions of the workplace," *Burlington Northern, 548 U.S. at 61-62*, and typically involves discrete changes in the terms of employment, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)*; *accord Gu v. Boston Police Dep't, 312 F.3d 6, 14 (1st Cir. 2002)* ("To be adverse, an action must *materially* change the conditions of plaintiffs' employ." (emphasis added)). A materially adverse change in the terms and conditions of employment "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Marrero v. Goya of P.R., Inc., 304 F.3d 7, 23 (1st Cir. 2002).*

Whether an employment action is materially "adverse" -- and therefore actionable under Title VII -- is gauged by an objective standard. *Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996).* "Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *Marrero, 304 F.3d at 23* (internal quotation marks omitted).

2. Retaliation

Unlike its private-sector counterpart, Title VII does not contain an express antiretaliation provision applicable to the federal government as employer. *See 42 U.S.C. § 2000e-16(a)*. Nonetheless, we have assumed that the antiretaliation provision applicable to private employers operates to prohibit retaliation in the federal sector. *See DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008)*; *see also Gomez-Perez v. Potter, 553 U.S. 474, 128 S. Ct. 1931, 1941 n.4, 170 L. Ed. 2d 887 (2008)* (acknowledging, but declining to decide, the open question of "whether Title VII bans retaliation in federal employment").

As with a claim for discrimination, a plaintiff alleging workplace retaliation must prove, among other things, that he suffered an "adverse employment action" on account of a protected activity. *See, e.g., DeCaire, 530 F.3d at 19*; *see also Broderick v. Donaldson, 437 F.3d 1226, 1232, 369 U.S. App. D.C. 374 (D.C. Cir. 2006)*("In the absence of a finding that the plaintiff has suffered adverse action, a retaliation claim fails as a matter of law."). However, "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington Northern, 548 U.S. at 64*; *see also Billings v. Town of Grafton, 515 F.3d 39, 54 (1st Cir. 2008)*("[C]onduct need not relate to the terms or conditions of employment to give rise to a retaliation claim."). Rather, a plaintiff may satisfy this requirement by showing that "a reasonable employee would have found the challenged action materially adverse, 'which in this

context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern, 548 U.S. at 64.*[12]

"This is an objective test and 'should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'" *Lockridge v. Univ. of Me. Sys., 597 F.3d 464, 472 (1st Cir. 2010)* (quoting *Burlington Northern, 548 U.S. at 71*). Examples of adverse employment actions in the retaliation context "include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Lapka v. Chertoff, 517 F.3d 974, 986 (7th Cir. 2008)*(quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (9th Cir. 1993)).* Minor disruptions in the workplace, including "petty slights, minor annoyances, and simple lack of

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[12] In *Gomez-Perez*, the Supreme Court held that the Americans with Disabilities Act's (ADA) federal-sector provision, which "was patterned 'directly after' Title VII's federal-sector discrimination ban," prohibited workplace retaliation through its substantive antidiscrimination prohibition. *See 128 S. Ct. at 1940.* Potter thus maintains that Title VII's federal-sector provision bans workplace retaliation, if at all, only if it results in an adverse "personnel action[]," *42 U.S.C. ß 2000e-16(a),* which he contends means only those actions that affect employment or alter the conditions of the workplace. We do not reach this argument because we conclude that even under the *Burlington Northern* standard Morales has failed to prove he suffered any adverse employment action.

good manners," fail to qualify. *Burlington Northern, 548 U.S. at 68.*

3. Morales's Claims

a. The Coffee and Lunch Break Policy

The first set of claims brought by Morales, alleging both discrimination and retaliation, arises from his allegation that the Caparra Heights coffee and lunch break policy was not enforced in an equal and nondiscriminatory matter, insofar as certain female employees were, at times, permitted to take longer breaks than the policy provided for. Under the policy, employees were allowed to take either a half hour or an hour lunch break, plus a ten minute coffee break during each half of their shift. When Morales complained about the discriminatory enforcement of the policy, his supervisor began to require all employees to clock in and out each time they took a break.

However, even if two female employees were permitted to take longer breaks than Morales on account of their gender, such selective enforcement of the breaks policy had no material effect on Morales's employment and therefore cannot constitute discrimination within the meaning of the statute. He was not formally disciplined for violating the policy,[13]

[13] While Morales received a letter of warning for taking an extended coffee break on March 22, 2006, the letter was removed from plaintiff's file just 5 days later. This preliminary action was insufficient to support a claim of discrimination. *See 29 C.F.R. β 1614.107(a)(5)* (requiring agency to "dismiss" any administrative complaint that "is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory").

or denied the opportunity to take breaks himself. On these facts, we hold that the selective enforcement of the breaks policy fails to sustain a claim for gender discrimination.

Likewise, we conclude that the selective enforcement of the breaks policy fails to rise to level of actionable retaliation. Morales's retaliation claim includes an allegation that, following the submission of an EEOC complaint, his supervisor, Enrique Lopez, closely monitored the lunch and coffee breaks Morales took. He also testified that, by requiring that all employees clock in and out each time they went on break, Lopez attempted to stir up other employees against him.[14] Morales, however, was not treated differently than other employees in the application of the policy as a result of his complaint; indeed, his complaint rests on the assertion that all employees were treated equally (though they may not have liked it). Thus, the adverse action anchoring Morales's complaint of retaliation is essentially the relief he requested in his discrimination complaint,

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[14] Specifically, Morales testified:

> And, in front of everyone, [Lopez] said that, because someone had placed an EEO[C complaint], now everybody had to punch in their timecards for every time they would go out on a break, when they left on break, and when they came back. Obviously, this was a policy that the employees did not like. And so, all of them . . . well, maybe not all of them, but most of them started to look at me bad.
>
> It was a very smart way of putting the employees against me.

and therefore would not dissuade a reasonable employee from filing or supporting a charge of discrimination. *Cf. Burlington Northern, 548 U.S. at 68* ("An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.").

Accordingly, Morales's claims arising from the selective enforcement of the breaks policy fail as a matter of law because Morales suffered no material adverse employment action within the meaning of Title VII's discrimination or retaliation provisions.

b. Rotation of Responsibilities

Next, Morales asserts claims for both discrimination and retaliation arising from the "incident in which plaintiff's duties and responsibilities were awarded to a female employee and he was given window clerk duties to perform." *Morales I, 339 F.3d at 18.* We hold that this temporary rotation of Morales's preferred distribution duties to a female clerk fails to qualify as an adverse employment action for purposes of either claim.

Morales was required to perform "window" duties rather than "distribution" duties for only a limited period of time, those duties fell within his job description (indeed, which he bid for), and there was evidence that on other, albeit rare, occasions he had performed "window" duties in the normal course of his employment. *Cf. Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1215 (11th Cir. 2008)* ("Requiring an employee to perform her job is not a change in the terms, conditions, or privileges of her employment.").

Morales himself testified that, "I was trained for [window duties]. I could do [them]. I was prepared to do [them]." Such a minor disruption in the tasks Morales preferred to perform cannot, as a matter of law, sustain his claim for damages under Title VII's antidiscrimination provision. *See Marrero, 304 F.3d at 23* (secretary's permanent, lateral reassignment to work in same capacity for different boss did not rise to level of an adverse employment action where "her general job description and salary remained the same," notwithstanding the fact that she "was required to do more work, subjected to 'extreme supervision,' and forced to undergo a period of probation"); *see also Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)* (explaining that "a lateral transfer that does not affect pay (or significantly affect working conditions) cannot be called discriminatory").[15]

Nor can this temporary rotation of responsibilities qualify as an adverse employment action for purposes of his retaliation claim. In appropriate circumstances, disadvantageous work assignments may qualify as materially adverse, but Morales's

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[15] We emphasize that there was no evidence presented at trial that the rotation was permanent, or that he was divested of *meaningful* job responsibilities as a consequence. *Cf. DeNovellis, 124 F.3d at 306* (explaining that "five-month assignment [of plaintiff] to a financial position for which he had no background and the concomitant deprivation of meaningful duties constituted an adverse employment action within the meaning of Title VII"). Rather, his testimony demonstrates that he experienced the sort of temporary "reassignment that involves only minor changes in working conditions [which] normally does not constitute an adverse employment action." *Marrero, 304 F.3d at 23.*

temporary reassignment is a far cry from those situations where we have found actionable retaliation. *See generally Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 95 (1st Cir. 2006)* (finding a totality of assignments, which included a police officer's transfer for an "unusually long" duration to a "remote and solitary" duty site that was "regarded as punishment" by officers, to constitute adverse employment action).

While Morales testified that the window duties presented certain "physical difficulties" in light of his arm condition, he made it crystal clear that he was able to perform those duties "as long as it was not for a long time" and he did not state that he experienced any unique hardship as a result of performing "window" tasks. There is no evidence that window duties were more difficult, less prestigious, or objectively inferior to Morales's distribution duties; rather, the gravamen of Morales's complaint is that he preferred his regular assignment. *Compare Burlington Northern, 548 U.S. at 71* (holding that permanent reassignment of a female forklift operator to track laborer was a materially adverse action where there was "considerable evidence that the track laborer duties were 'by all accounts more arduous and dirtier'; that the 'forklift operator position required more qualifications, which is an indication of prestige'; and that 'the forklift operator position was objectively considered a better job and the male employees resented [the plaintiff] for occupying it'").

Under the circumstances, we hold that the temporary rotation of Morales preferred window

duties does not qualify as materially adverse and cannot support his claims under Title VII.

c. The Altered Job Posting

Morales's final claim, alleging retaliation only, focuses on the altered job posting. He maintains that, because he filed a complaint with the EEOC, the USPS changed the days off that were expected to come with a certain Distribution and Window Clerk position when it was posted for bidding. There is no dispute that the only difference between Morales's position at the time of this incident and the position in which he expressed an interest was that the new posting was expected to come with Saturdays and Sundays off, but was ultimately posted with Thursdays and Sundays off instead. We conclude that this alteration of rest days was insufficient to dissuade a reasonable employee from filing or supporting a charge of discrimination.

In appropriate circumstances, not present here, a schedule change may operate to dissuade a reasonable employee from reporting workplace discrimination. *See Burlington Northern, 548 U.S. at 69*. In this case, however, there is no indication in the record that changing the days off associated with the new posting affected Morales any more than it did other eligible bidders. *See Lockridge, 597 F.3d at 473* (no adverse employment action where denial of office space "left [the employee] in no worse a position than that held by similarly situated faculty members"). Moreover, there is no evidence that Morales suffered any undue hardship as a result of continuing to have Sundays and Mondays, rather than Sundays and Saturdays, off. *See Burlington Northern, 548 U.S. at*

69 (explaining that "[a] schedule change in an employee's work schedule may make little difference to many workers, [but] may matter enormously to a young mother with school-age children"); *see also Washington, 420 F.3d at 662* (finding flex-time schedule critical to employee with disabled child, and recognizing that actions "that would be harmless to most people [may] do real damage to select targets"). Rather, Morales testified that, as a result of the rotation, he continued to have Sundays and Mondays off rather than a normal weekend schedule, which he would have preferred. This is plainly insufficient to support a claim for retaliation under the statute. *Cf. Hughes v. Stottlemyre, 454 F.3d 791, 797 (8th Cir. 2006)* (no actionable retaliation where there was "no evidence to suggest [employee] suffered a materially significant disadvantage by having to work more Sundays and Wednesdays," rather than his preferred schedule).[16] We note that Morales's own medical

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[16] Other courts confronting roughly similar circumstances have come to the same conclusion. *Thomas v. Potter, 202 Fed. Appx. 118, 119 (7th Cir. 2006)* (unpublished decision)(plaintiff's assertion that shift change was undesirable or inconvenient did not rise to the level of a materially adverse employment action under *Burlington* where the plaintiff did not assert and record did not contain evidence that the plaintiff had "a unique vulnerability that the Postal Service knew about and sought to exploit by changing his shift schedule"); *Smith v. Potter, 629 F. Supp. 2d 644, 652 (S.D. Miss. 2009)*(retaliation claim alleging that USPS "attempted to force [plaintiff] to return to working a schedule with off days of Friday and Saturday," which plaintiff had worked for preceding six years, did not constitute an adverse employment action under *Burlington Northern* even though plaintiff may have preferred Saturdays and Sundays off); *Arredondo v. Flores, Civil Action No. L 05-191, 2008 U.S. Dist. LEXIS 77675, 2008 WL 4450311, *20 (S.D. Tex. Sept. 30,*

expert failed to identify the altered job posting as a stressor contributing to his adjustment disorder.

Thus, after careful consideration, we conclude that Morales has failed to prove that he suffered any adverse employment action capable of supporting his claims for discrimination or retaliation.[17] Accordingly, we vacate the verdict and remand to the district court with instructions to enter judgment as a matter of law in Potter's favor. No costs are awarded.

Vacated and Remanded.

2008) ("Even if the *Burlington* standard applies, a change in schedule, shift, and days off, in this setting, is insufficient to establish an adverse employment action").

[17] Even considering these incidents cumulatively, we still conclude that Morales has failed to establish that he suffered any adverse employment action within the meaning of Title VII's antiretaliation provision. *See Aryain v. Wal-Mart Stores Texas LP, 534 F.3d 473, 485 (5th Cir. 2008)* (negative treatment, undesired transfer to another department, undesirable break schedule, and assignment of more arduous and dirty jobs are not adverse employment actions in the retaliation context).

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 08-2346
08-2452

ANGEL DAVID MORALES-VALLELLANES,
Plaintiff-Appellant/Cross-Appellee,

v.

JOHN E. POTTER, UNITED STATES POSTMASTER GENERAL,
Defendant-Appellee/Cross-Appellant.

JUDGMENT

Entered: May 11, 2010

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The verdict is vacated, and the matter is remanded to the district court with instructions to enter judgment as a matter

of law in John E. Potter's favor. No costs are awarded.

By the Court:
/s/ Margaret Carter, Clerk

cc: Hon. Camille L. Vélez-Rivé, Ms. Frances de Moran, Clerk, United States District Court for the District of Puerto Rico, Mr. Luciano-Delgado, Ms. Dover, Mr. Karro, Ms. Miranda-Gutierrez, Mr. Sevillano De Rio, Mr. Perez-Sosa & Mr. Abate.

APPENDIX C
United States Court of Appeals
For the First Circuit

Nos. 08-2346; 08-2452

ANGEL DAVID MORALES-VALLELLANES
Plaintiff-Appellant/Cross-Appellee
v.
JOHN E. POTTER, POSTMASTER GENERAL
Defendant-Appellee/Cross-Appellant

UNITED STATES POSTAL SERVICE; UNITED STATES DEPARTMENT OF LABOR, Occupational Health and Safety Administration (OSHA); U.S. ATTORNEY GENERAL FOR THE DISTRICT OF PUERTO RICO; AMERICAN POSTAL WORKERS UNION, Puerto Rico Area Local (APWU-PRAL) AFL-CIO; DANIEL SOTO, President APWU-PRAL; ENRIQUE LOPEZ; WILLIAM J. HENDERSON
Defendants

Before
Lynch, Chief Judge,
Torruella, Baldock, * Boudin, Lipez,
Howard and Thompson,
Circuit Judges.

ORDER OF COURT
Entered: August 13, 2010

Pursuant to First Circuit Internal Operating

Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
/s/ Margaret Carter, Clerk

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*Of the Tenth Circuit, sitting by designation

cc:
Miguel Emilio Miranda-Gutierrez
Nelson J. Perez-Sosa
Fidel A. Sevillano Del Rio
Michael P. Abate
Marleigh D. Dover
David G. Karro

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ANGEL DAVID MORALES-VALLELLANES	**AMENDED JUDGMENT IN A CIVIL CASE**
V.	Case Number: 97-2459(GAG/CVR)
UNITED STATES POSTAL SERVICE	

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
$300,000.00 IN COMPENSATORY DAMAGES
BACK PAY IN THE AMOUNT OF **$115,302.00**,
PLUS INTEREST.

SEPTEMBER 8, 2008 Date	FRANCES RIOS DE MORAN Clerk S/Yelitza Rivera-Buonomo (By) Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Morales-Vallellanes v. United States Postal Service

CIVIL NO. 97-2459(GAG/CVR)

August 27, 2008, Decided

OPINION AND ORDER

INTRODUCTION

On December 21, 2007, plaintiff Angel David Morales-Vallellanes ("Morales-Vallellanes") was favored after a jury trial with a Title VII discrimination verdict against defendant United States Postal Service ("USPS") in the amount of $500,000.00.[1]

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[1] The jury determined plaintiff proved he was intentionally discriminated by defendant on the basis of sex or gender and he was also subject of intentional discriminatory retaliation. (Docket No. 405). Upon request from the government, the amount of damages was reduced to $ 300,000.00, since recoup against the government is capped. (Docket No. 403).

On April 16, 2008, this Court issued an Opinion and Order ruling on plaintiff Morales-Vallellanes' post-trial motion as to back and front pay. In said Opinion, we considered plaintiff Morales-Vallellanes' earnings for the last eleven (11) years, and that he may be finally discharged from disability under the Workers' Compensation Program ("OWCP") which is 66 2/3% of his salary, tax free, with no mandatory deductions, as well as a set-off of benefits already received,[2] for which back pay was awarded from 1997 through 2008 for a total of $ 64,504.00, plus interest. Front pay was not awarded. As such, the equitable relief allowed in the post-trial judgment requests was for a total of $ 64,504.00, plus interest. (Docket No. 430).

The government thereafter filed a Motion to Set Aside the Verdict and under *Rule 50* and *59(a)* and *(e)*. (Docket Nos. 436 and 437). After several extensions of time, plaintiff filed its Supplemental Motion to Partially Set Aside and a Response in Opposition to Set Aside Verdict (Dockets Nos. 440, 441).

Upon careful consideration of the submissions of the parties and the applicable law, defendant USPS's "Motion to Partially Set Aside" and under *Rule 50* and *59(a)* and *(e)* (Docket Nos. 436 and 437) are DENIED and plaintiff's Motion to Set Aside Judgment (Docket No. 440) is GRANTED IN PART AND DENIED IN PART, solely as to the amount of

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[2] Considering the testimony and calculations of the expert witness' opinion, the estimated yearly gross income of $ 46,654.00 was the value amount of the disability payments received by plaintiff, before taxes.

back pay that is amended to conform with the evidence as modified by the government's expert witness in considering plaintiff's civil status incorrectly. We shall briefly explain.

ANALYSIS

Defendant USPS is requesting a determination that no reasonable jury could have found for plaintiff Morales-Vallellanes as to the gender and retaliation claims and to set aside the jury award in the amount of $ 500,000.00, later reduced to the legal cap of $ 300,000.00. Defendant USPS argues plaintiff Morales-Vallellanes did not prove his case of sex or gender discrimination and for retaliation by preponderance of the evidence and that, although its *Rule 50* motion for judgment as a matter of law was denied initially and once it was renewed, the verdict should now be set aside or new trial be granted.

Defendant USPS also avers the verdict in favor of plaintiff Morales-Vallellanes should be subject of remittitur because the jury verdict is excessive and against the weight of the evidence. Defendant also considers the alleged retaliation, for making safety complaints to the Department of Labor, is not covered under the Civil Rights Act of 1964, as amended in 1991 and for which reason there is no actionable cause of action as to plaintiff Morales-Vallellanes' discrimination claim. [3]

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[3] In support of this proposition, defendant USPS submits the ruling in Michael G. Ypsilantis v. Department of Labor, Appeal No. 01A05062 (March 27, 2001), where the Equal Employment Opportunity Commission construes Title VII regulation as not covering non-EEOC based protected activity.

A. Judgment as a Matter of Law - *Rule 50 (b).*

Defendant requests to set aside the jury verdict and to enter judgment as a matter of law.

Rule 50(b) states:

> (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-and may alternatively request a new trial or join a motion for a new trial under *Rule 59*. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
>
> (A) allow the judgment to stand,
>
> (B) order a new trial, or
>
> (C) direct entry of judgment as a matter of law; or ...

In ruling upon this motion for judgment as a matter of law it has been held that "[a] court is without authority to set aside a jury verdict and direct the entry of a contrary verdict unless the

evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." *Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 759-60 (1st Cir. 1994).* Moreover, in determining if the standard has been met, the court is required to examine the evidence in the light most favorable to the non-moving party, and the non-moving party is entitled to "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Id. at 760 (quoting Cochrane v. Quattrocchi, 949 F.2d 11 (1st Cir. 1991)).*

The standard for setting aside a jury verdict pursuant to *Fed.R.Civ.P. 50(b)* is a stringent one: the Court must deny the motion for judgment as a matter of law unless the evidence, together with all reasonable inferences in favor of the verdict, could lead a reasonable person to only one conclusion, namely, that the there is a total failure of evidence to prove plaintiff's case. *See Vazquez-Valentin v. Santiago-Diaz, 385 F.3d 23, 29 (1st Cir. 2004); Lama v. Borras, 16 F.3d 473, 477 (1st Cir. 1994).* In reviewing the record, the Court will evaluate neither the credibility of the witnesses nor the weight of the evidence. *Vazquez-Valentin, 385 F.3d at 29; Santiago-Negron v. Castro-Davila, 865 F.2d 431, 445 (1st Cir. 1989).*

Defendant USPS avers the only evidence the jury could have considered to justify its verdict evolves:

First, only evidence of the three available claims, and not the plethora of claims,[4] was to be considered as to retaliation for the change in rest days, the sexual or gender discrimination allegation that involved Ms. Mayra Irene and the claim that the coffee break policy by defendant was not applied in an equal and nondiscriminatory manner.

Secondly, defendant argues that, since plaintiff Morales Vallellanes was not fired, suspended, demoted, or otherwise suffered any adverse personnel action, continued to enjoy having Sundays and Mondays off as rest days and any change in rest days were due to business reasons or operational needs, no tangible harm or loss under *Title VII* would have allowed him to prevail on the jury award. Defendant claims plaintiff's evidence for discrimination as to the change of rest days for the upcoming position that he bid on, which was later changed, or as to the seniority or qualifications entailed to award the position, were but pure speculation and did not meet the definition of adverse action for the jury to have granted such an award. Still, the jury found otherwise and awarded monetary compensation upon a finding of discrimination.

The verdict form filled out by the jury indicated plaintiff had proven that (1) he was intentionally discriminated against by defendant on the basis of sex or gender; (2) he was subjected by defendant to intentional discriminatory retaliation. The amount of compensatory damages awarded for both (1) and (2)

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[4] Defendant's Motion to Set Aside Verdict and under *F.R.C.P. 50* and *59 (a)* and *(e)*, pp. 9-10 (Docket No. 437).

components was found to be $ 500,000.00. (Docket No. 405).

Defendant has once more submitted plaintiff Morales-Vallellanes should not be entitled to a cause of action for his claim of retaliation since the grounds submitted in support refers to some OSHA violations he filed and these are not the protected activities contemplated by statute. This argument was previously raised in defendant USPS' motion for summary judgment (Docket Nos. 244, 245) and was denied as presenting genuine factual disputes in controversy. (Docket No. 270).

On one hand, defendant USPS argues legal grounds to dismiss plaintiff Morales- Vallellanes' claim of retaliation because his OSHA complaints are not to be considered protected activity under *Title VII* since *Section 631* does not entail retaliation for OSHA complaints. [5] At first glance, there is an expansive nature of the rights to be free from retaliatory actions by an employer, including the federal employers, when the Highest Court of this nation ruled in *Gomez-Perez v. Potter* although specifically as to ADEA [age discrimination] retaliation related claims. [6] Prior Supreme Court decisions had found that claims of retaliation were

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[5] *29 USCA § 660(c)(2)* -any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such violation.

[6] *See Gomez-Perez v. Potter, 553 U.S. 474, 128 S.Ct. 1931, 170 L. Ed. 2d 887 (2008)* (*certiorari* granted and vacating summary disposition when favoring defendant's arguments the federal-sector provision does not reach retaliation for an ADEA claim).

covered by anti-discrimination statutes. *See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L. Ed. 2d 386 (1969); Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 125 S.Ct. 1497, 161 L. Ed. 2d 361 (2005).* [7]

On the other hand, and rather dispositive of the defendant's contention, although OSHA claims were grounds for plaintiff Morales-Vallellanes' complaint as to the change in rest days for the position published, whether these are considered to be or not covered by the federal cause of action filed, plaintiff had also filed an EEO pre-complaint based on retaliation because of having changed the rest days of a position he was interested. Thereafter, he filed a formal EEO complaint based on retaliation for the changes made as to the rest days for the position at issue. For these reasons, the OSHA claims were not the only grounds for the rights to be vindicated but rather a more general non-itemized rights covered by EEO complaints and *Title VII.* [8]

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[7] Retaliation covered by vindication under *§ 1981* [race discrimination] as to rights of minorities and Title IX covers retaliation related to discrimination under any education program [education rights and federal funds involved programs], respectively, which evidently includes discrimination on account of having complained about discrimination. *Gomez Perez v. Potter, 128 S.Ct. at 1937.*

[8] In Gomez Perez v. Potter, the Highest Court stated not being persuaded with defendant's contention of a clear difference between a cause of action for discrimination and a cause of action for retaliation. *Id. at 1938.* Further, whether Congress created or not a private right of action should not be construed as a justification for narrowing the scope of the underlying prohibition, which would otherwise suggest the interpretation that Congress could have perceived a need for a strong remedy. *Id. at 1938.*

Thus, these retaliatory actions regarding OSHA and/or EEO based complaints are commingled and can hardly be differentiated. For this reason, defendant's argument that, retaliation for the actions taken by defendant USPS regarding protected activities refer solely to OSHA claims, is not supported by the record nor by the findings of the jury.[9]

B. Plaintiff is Precluded from Relief for Constructive Discharge and Emotional Distress.

Defendant USPS also submits that, under the Court of Appeals for the First Circuit previous remand,[10] plaintiff Morales-Vallellanes was precluded from presenting claims, except for three limited controversies therein enunciated; 1) retaliation for change in rest days, 2) sexual or gender discrimination allegations, and 3) the claim of discriminatory and unequal application of break policies. Thus, anything outside this scope should not have been factored in the liability phase of the case nor in the remedial phase, including equitable relief, that is, when grating or not front and back pay.

Accordingly, defendant USPS argues that plaintiff Morales-Vallellanes was precluded from presenting evidence of constructive discharge. To this

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[9] The record also shows plaintiff Morales-Vallellanes' gender and sex discrimination for having been removed from his assigned duties and replaced by a female employee, was a reprisal by supervisor Lopez for the filing of an EEO complaint. The jury determined the issues of credibility on this issue and found discrimination.

[10] *Morales-Vallellanes v. Potter, 339 F.3d 9 (1st Cir. 2003).*

effect, defendant claims constructive discharge would have required, absent any jury instruction as to constructive discharge or relief there under, proof of severity and/or pervasiveness of harassment events to warrant the verdict returned in this case and such evidence was not presented in this case.

Defendant avers the Court of Appeals determined the emotional distress claim was not sufficient as it did not rise to the level of extreme and outrageous, for which this claim fails as a matter of law. These rulings by the Court of Appeals precluded plaintiff Morales-Vallellanes from seeking any relief for constructive discharge and for emotional distress and would also preclude this Court from granting any equitable relief as to back and front pay.

The above argument is consonant with the Court of Appeals prior determination if determined under the narrow scope presented by defendant USPS. Yet, equitable relief may have also attached to the prevailing jury verdict regarding the existence of discrimination and retaliation as can reasonably be ascertained from the jury verdict form which was agreed upon by both parties prior to submitting same to the jurors, as well as the instructions.

Although defendant USPS submits the jury could not have found such amount of damages in the absence of any emotional distress and constructive discharge claims, since it was precluded from considering same, the fact remains on the record the jury indeed rendered a verdict in the amount of $ 500,000.00, that was capped at $ 300,000.00, as required based on the evidence of sex and gender discrimination and for retaliation submitted and

considered by them and so expressed in the verdict form.

The instructions provided to the jury were also clear and agreed upon by the parties in that:

Jury Instruction No. 8 - *Title VII* is not a general activity code for the American workplace and does not prohibit all verbal or physical harassment. The statute only prohibits harassment if it constitutes discrimination with respect to the "terms, conditions, or privileges of employment. Thus, *Title VII* is violated only "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment... *Title VII* does not make actionable the ordinary tribulations of the workplace."

The jury was properly instructed as to their need to assess whether based on the evidence before them, a Title VII violation was proven.

The jury was further advised as to what actions they were to consider for purposes of plaintiff's claims. Jury Instruction No. 14A - ... plaintiff Morales' *Title VII* cause of action is limited to those discrimination and retaliation allegations in his amended complaint that were previously the subject of a formal EEO complaint to wit; 1. Morales' allegation that Job Bid # 2541417 was posted with Thursday/Sunday rest days rather than Saturday/Sunday rest days in retaliation for plaintiff's OSHA complaints; 2. Morales' allegation of sexual discrimination and retaliation arising on April 9, 1996, incident in which plaintiff's duties and

responsibilities were awarded to a female employee and he was given window clerk duties to perform; 3. Morales' allegation that the 'coffee and lunch break's policy' was not applied in an equal and nondiscriminatory matter.

Although defendant USPS has argued the OSHA component of the complaint regarding change in rest days, the complete jury instructions 14A above also made reference to those allegations that were subject of a formal EEO complaint not solely to OSHA.

The jury was also instructed to consider whether the discrimination and retaliation was the motivating factor or if the defendant USPS's reason for employment actions as to plaintiff Morales-Vallellanes were valid and nondiscriminatory. See Jury Instruction No. 15.

In light of the verdict rendered, it is a reasonable inference that the jury chose to consider defendant's reasons as pretextual.[11]

The necessary components of a *prima facie* Title VII retaliation claim was provided to the jury in Jury Instruction No. 16. Plaintiff had to show, the following: 1. participation in a protected activity known to the employer; 2. adverse employment action taken against plaintiff; and 3. causal connection between the protected activity and the adverse employment action. The shifting of the burden when a prima facie case is established to defendant to articulate a legitimate,

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[11] We presume juries understand and follow the court's instructions. *United States v. Kornegay, 410 F.3d 89, 97 (1st Cir. 2005).*

nondiscriminatory reason was also therein included. Once defendant had dispelled the inference of retaliation by establishing a legitimate, nondiscriminatory reason, the plaintiff can still prevail if the plaintiff demonstrates that the articulated reason was a mere pretext for discriminating and/or retaliating. The jury assessed the evidence and is considered to have followed the instruction and found for plaintiff Morales-Vallellanes in the discrimination and retaliation items of their verdict form.

The parties further agreed to include instructions No. 17 as to poor management decisions not being ground for *Title VII*, only those decisions intentionally based on impermissible factors. It was also instructed that personality conflicts or personal animosity was not a form of discrimination. See Jury Instruction No. 18.

Defendant argues as to the damages amount awarded by the jury, yet the jury was instructed that plaintiff could not recover for stress caused by litigation. Jury Instruction No.19. The employment adverse actions giving grounds to a Title VII claims were also part of the instructions. See Jury Instruction No. 20. The jury was to award the damages, if any, they so determined as reasonable compensation and to consider damages only if necessary. Jury Instructions No. 21, 22. See also instructions on Conduct and Damages Separate and Distinct Issue (No. 23) and Damages for Injury in Fact (No. 24). Both parties also agreed as to the Proximate Causation of said Damages instruction as proper (No. 25), as being those reasonable and not speculative (No. 27).

As such, the jury had the adequate frame of evidence to assess and to make the corresponding credibility determinations. The jury followed the instructions provided by the Court and as agreed upon by the parties, to fulfill their delegated duties and determine liability pursuant to statute and the compensation deemed adequate.

C. Amended Formula for Equitable Relief - Back Pay.

In the alternative, defendant USPS indicates that its own expert witness, Dr. Mohinder Bhatia, acknowledged he made a mistake in his calculations for being under the impression plaintiff Morales-Vallellanes was a married man and, thus, wrongfully calculated benefits in 75% as the OWCP annual payment. The amount considered by the Court of $ 39,389.00 is the 75% of the $ 52,518.00 and not the 66 2/3% this Court should have considered in its Opinion and Order. Thus, the amount of back pay should be amended to conform to the correct formula.

In fact, the Opinion and Order indeed considered that Dr. Mohinder Bhatia's testimony revealed the figure to be used to estimate equitable back pay, including the set-off from OWCP benefits as well as that these benefits were free from any withholdings and taxes. He also considered fringe benefits in his calculations. *Tr. pp. 16-30, Docket No. 419.*[12]

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[12] Health plan employer's contributions were estimated close to eight hundred three dollars with seventy six cents for the year 1998. *Id. p. 17.* However, sick leave and vacation or annual leave are already calculated in the salary. *Id.* p. 21-23.

Documentation and testimony assessed in this Magistrate Judge's prior Opinion and Order indicated the total figure regarding the benefits paid and already received by Morales-Vallellanes was two hundred seventy three thousand six hundred sixty five dollars with twenty one cents ($ 273,665.21), tax free, and without any withholdings, as well as some medical payments of twelve thousand seven hundred and ninety six dollars with nineteen cents ($ 12,796.19). *Tr. p. 31-32.* Based on the adjustment of growth of three point one percent (3.1%), plaintiff's adjusted salary would be fifty two thousand five hundred and eighteen dollars ($ 52,518.00). Annual payments of OWCP are thirty nine thousand three hundred eighty nine dollars ($ 39,389.00), which if taxable [if divided by ninety point one percent], would increase to forty three thousand eighty five dollars ($ 43,085.00). *Id. pp. 36-37.* This figure would then be divided by 92.35% to yield an estimated yearly gross income of $ 46,654.00 being the value amount of the disability payments received by plaintiff Morales- Vallellanes. *Id. pp. 41-42.*

Thus, in our previous Opinion and Order we took and considered $ 52,518.00 of adjusted yearly salary and reduced from same the total estimated yearly income of $ 46,654.00 (being the value amount of the disability payments received), the corresponding back pay resulted in an annual difference of $5,864.00, which multiplied by eleven (11) years, from 1997 through 2008, yielded a total $ 64,504.00, plus interest. Accordingly, the amount of $ 64,504.00, plus interest, was then estimated as the amount to be granted to plaintiff Morales-Vallellanes as equitable relief for back pay.

Nevertheless, the government correctly has now indicated that its own expert witness, Dr. Bhatia, acknowledged having considered plaintiff Morales-Vallellanes as being a married individual, instead of his single status, which is the correct one. The formula would thus have changed and the figure needs to be examined as back pay should be modified accordingly.

Thus, we now determine the award of back pay under the amended criteria. Incorporating all the findings and determinations of our previous Opinion and Order, we so rule and thus find the award of back pay should be as explained herein below.

Based on the adjustment of growth of three point one percent (3.1%), plaintiff's adjusted salary would be fifty two thousand five hundred and eighteen dollars ($ 52,518.00). Annual payments of OWCP at 66 2/3% were for thirty four thousand nine hundred seventy seven dollars ($ 34,977.00), which if taxable would increase to thirty eight thousand eight hundred twenty dollars ($ 38,820.00) [$ 34,977.00 / 90.1 x 100]. This figure would then be divided by 92.35% to yield an estimated yearly gross income of $ 42,036.00 being the value amount of the disability payments received by plaintiff Morales- Vallellanes. *Id. pp. 41-42.*

Thus, considering $ 52,518.00 of adjusted yearly salary and reduced from same the total estimated yearly income of $ 42,036.00 (being the value amount of the disability payments received), the corresponding back pay would result in an annual difference of $ 10,482.00, which multiplied by eleven

(11) years, from 1997 through 2008, yielded a total $ 115,302.00, plus interest.

Accordingly, the amount of **$ 115,302.00, plus interest,** would be the adjusted amount to be granted to plaintiff Morales- Vallellanes as equitable relief for back pay.

D. New Trial or Remittitur.

Defendant USPS further submits plaintiff's jury award required the jury to consider only the three claims allowed by the Court of Appeals on remand. Thus, the award should be no more than $ 42,000.00, and this Court should grant remittitur as any recovery for the minimal damages suffered, if any, that plaintiff would have endured solely for six months maximum, at the rate of $ 7,000.00 per month. Remittitur of the capped amount is thus requested to be no more than $ 42,000.00.

"Remittitur is defined as the process by which a court compels a plaintiff to choose between the reduction of an excessive verdict and a new trial." *See Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2nd Cir. 1984).* If the court considers that a jury's verdict is excessive, it may condition the grant of a new trial on the victorious party's refusal to accept a reduced verdict. The court cannot enter a judgment with the reduced verdict without the party's consent. Because remittitur presents a direct interference with the jury's prerogatives, the court limits its concession to the situations in which the award "shocks the judicial conscience". *See Earl v. Bouchard Transp. Co., Inc., 917 F.2d 1320, 1328 (2nd Cir.1990).* "[T]he question [is] whether the amount of

damages found by the jury is so excessive and exorbitant as to show passion and prejudice on the part of the jury." *Id.*

Defendant USPS also argues that if the Court adopts the testimony of Dr. Ramon Fortuno as to the adjustment disorder not lasting more than six (6) months after the stressor actions had finished, not the eleven year period plaintiff Morales-Vallellanes has been out of employment, plaintiff should have left behind whatever happened to him at the Caparra Station within said short time period and compensation accordingly should not exceed the $ 42,000.00 proposed. Precisely because the jurors' assessment of damages in this case, a six month compensation time as proposed by defendant would be also speculative.

Insofar as defendant's request for new trial, *Rule 59(a)* allows the Court to order a new trial, upon a party's or its own motion, "for any of the reasons for which new trials have heretofore been granted." *Fed.R.Civ.P. 59(a); see also Taber Partners I v. Insurance Corp. of North America Inc., 917 F.Supp. 112, 116 (D. Puerto Rico 1996) affd. 121 F.3d 695 (1st Cir. 1997).*

The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of the alleged substantial errors in admission or rejection of evidence or instructions to the jury. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243,*

251, 61 S.Ct. 189, 85 L. Ed. 147 (1940). The Court may grant a new trial although it has denied the entry of judgment as a matter of law under *Fed.R.Civ.P. 50, China Resource Products (U.S.A.) Ltd. v. Fayda Intern., Inc., 856 F.Supp. 856, 862 (D. Del.1994),* or even when substantial evidence supports the jury's verdict, *Lama v. Borras, 16 F.3d 473, 477 (1st Cir. 1994).* Instead, a new trial "should only be granted where a 'miscarriage of justice would result if the verdict were to stand,' the verdict 'cries out to be overturned,' or where the verdict 'shocks our conscience.'" *Smith v. Delaware Bay Launch Service, Inc., 842 F.Supp. 770, 778 (D. Del. 1994)* (quoting *Cudone v. Gehret, 828 F.Supp. 267, 269 (D. Del. 1993)).*

The Court does not enjoy unbridled freedom to grant new trials, because a jury verdict may only be overturned in the most compelling of circumstances." *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 811 (1st Cir. 1988).* Indeed, "[t]he obstacles which stand in the path" of claims of excessiveness "are formidable ones." *Smith v. Kmart Corp., 177 F.3d 19, 29 (1st Cir. 1999)*(quoting *Wagenmann v. Adams, 829 F.2d 196, 215 (1st Cir. 1987)).* A jury award should not be disturbed only because "it is extremely generous or because ... [the Court] think[s] [that] the damages are considerably less...." *Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000)* (quoting *Koster v. Trans World Airlines, Inc., 181 F.3d 24, 34 (1st Cir. 1999)).* The jury's assessment of damages will not be disturbed unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." *Correa v.*

Hospital San Francisco, 69 F.3d 1184, 1197 (1st Cir. 1995); Koster v. Trans World Airlines, Inc., 181 F.3d at 34; Smith v. Kmart Corp., 177 F.3d at 30.

Only if the Court grants remittitur and plaintiff fails to accept same, would a new trial be warranted.

Foremost, jury verdicts are to be respected and sustained if supported by the evidence and when not grossly excessive or shocks the judicial conscience. At this juncture and having perused all the evidence of record, as well as the recollection of the two week trial and the evidence therein presented, this Magistrate Judge fails to find comfort in second-guessing the jury's determination when the record contains evidence wherein a reasonable jury could have reached a verdict based on same. Defendant USPS cannot properly argue there was a complete absence of evidence to support such verdict and nor does the record and the evidence reflect there is a miscarriage of justice under the *Rule 59*.

Succinctly, defendant USPS' request for judgment as a matter of law and/or for remittitur and/or new trial is DENIED.

The request to consider the equitable relief is to be amended under the new formula above discussed. As a result, back pay is amended and awarded in the amount of **$ 115,302.00, plus interest,** thus correcting the figure on said item determined in our prior Opinion and Order, which is otherwise incorporated and made part of this Order. The remaining issues requested by defendant USPS and as above discussed are DENIED.

Finally, consonant with the above discussed evidence of record and applicable law, which need not require further discussion, plaintiff's Motion to Partially Set Aside Judgment is also granted in part and denied in part upon amendment to the amount of back pay. **(Docket No. 440).**[13]

CONCLUSION

In view of the foregoing, defendant USPS's "Motion to Partially Set Aside" and under *Rule 50* and *59(a)* and *(e)* (Docket Nos. 436 and 437) are DENIED and plaintiff's Motion to Partially Set Aside Judgment is GRANTED IN PART AND DENIED IN PART. (Docket No. 440).

The Clerk is to enter Amended Judgment accordingly, which is to be modified as to the award of back pay which shall be **$ 115,302.00, plus interest.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 27th day of August of 2008.

/s/ **CAMILLE L. VELEZ-RIVE**

CAMILLE L. VELEZ-RIVE
UNITED STATES MAGISTRATE JUDGE

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[13] Plaintiffs prays to be granted back pay and front pay, plus interest, consonant with his expert's economic report, and as such set aside that part of the Opinion and Order at Docket No. 430.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ANGEL DAVID MORALES-VALLELLANES
Plaintiff, Appellant

v.

JOHN E. POTTER, UNITED STATES POSTMASTER GENERAL; AMERICAN POSTAL WORKERS UNION, PUERTO RICO AREA LOCAL (A.P.W.U. - P.R.A.L.) A.F.L.-C.I.O.; DANIEL SOTO, PRESIDENT A.P.W.U.- P.R.A.L.; ENRIQUE LOPEZ,

Defendants, Appellees.

No. 02-2190

339 F.3d 9 [*]

August 4, 2003, Decided

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
Hon. Jay A. Garcia-Gregory, U.S. District Judge;
Hon. J.A. Castellanos, U.S. Magistrate Judge.

Before Torruella, Selya, and Lipez, Circuit Judges.

OPINION

LIPEZ, *Circuit Judge*. Plaintiff Angel David Morales- Vallellanes ("Morales") brought this action against the United States Postal Service ("USPS" or "the Postal Service") alleging that he was the target of retaliatory and discriminatory acts provoked by complaints that he filed with the Occupational Safety and Health Administration ("OSHA"). Morales also sued the American Postal Workers Union ("APWU" or "the Union") and its president, Daniel Soto, in the same action, claiming that the Union breached its duty of fair representation by failing to submit and process his grievances against USPS.

The United States District Court for the District of Puerto Rico referred the case to a magistrate judge, who recommended that the court grant motions for summary judgment submitted by defendants USPS and the Union. Morales filed a lengthy objection to the report and recommendation, essentially restating the allegations in his amended complaint, but also incorporating sixty-seven new exhibits that had not previously been brought to the magistrate judge's attention. Concluding that "Plaintiff . . . failed to raise any material issue not adequately addressed by the magistrate judge in his Report," the district court adopted the magistrate judge's report and recommendation and granted the defendants' motions for summary judgment. After careful review, we affirm in part and reverse in part.

I.

We summarize the relevant facts from the summary judgment record, reciting them in the light most favorable to Morales. *See Diaz v. City of*

Fitchburg, 176 F.3d 560, 561 (1st Cir. 1999). In 1988, Morales was hired to work as a distribution and window clerk at the Caparra Heights, Puerto Rico, Station of the United States Postal Service. On April 7, 1995, plaintiff filed a letter with OSHA complaining of dust accumulation, rodent infestation, and other unsanitary conditions at the Caparra Heights station. OSHA ordered the station manager to correct the violations by June 19, 1995, but to no avail. Morales renewed his OSHA complaint through certified letters to the OSHA Area Director on August 1, 1995, February 23, 1996, and April 6, 1996. Finally, on June 14, 1996, OSHA conducted a formal inspection of the Caparra Heights station and confirmed plaintiff's allegations. OSHA cited the Caparra Heights station for at least five violations, and directed the station to remedy the safety and health hazards by October 9, 1996.

At this point, we bifurcate our chronology of the subsequent events for purposes of clarity, turning first to the circumstances that spawned Morales's claims against the Postal Service, and concluding with an account of the events underlying plaintiff's claims against the Union.

A. Events underlying the claims against USPS

Throughout the OSHA complaint process, the agency assured Morales that his identity as an OSHA complainant would be kept confidential, and that federal law forbade USPS from retaliating or discriminating against him for whistle-blowing. Nevertheless, plaintiff's amended complaint alleges that by July 1995 other employees at the Caparra Heights station were aware that he had filed OSHA

complaints, and were retaliating against him. That month, Morales alerted the Postal Inspection Service that he had received two threats from co-workers, but no remedial steps were taken.

In January 1996, plaintiff expressed interest in an available distribution and window clerk position with Saturdays and Sundays off.[1] USPS then allegedly re-classified the position to offer only Sundays and Thursdays off so as to decrease its desirability to plaintiff. On March 23, 1996, Enrique Lopez, the Caparra Heights station supervisor, issued a letter of warning to Morales for unsatisfactory performance, citing the plaintiff's "abuse of coffee breaks." Two months later, Lopez removed Morales from his position as a Business Reply Mail Clerk, Postage Due Clerk and Express Mail Clerk,[2] and replaced him with a female co-worker. In July 1996, tires on Morales's car were punctured on two separate occasions while the car was parked in the secured Caparra Heights station parking lot.

On October 10, 1996, Morales's contact at OSHA informed him that the agency had no authority to

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[1] At oral argument, plaintiff's counsel explained that the Caparra Heights station operates twenty-four hours a day, seven days a week. While employees at the post office typically work only five days a week, the allotted days off for many positions do not correspond with the weekend.

[2] Morales alleges that he was assigned to this position as a reasonable accommodation for a job-related injury. It appears that plaintiff suffered from a physical disability that limited the stress he could place on his right arm. This disability restricted the tasks that plaintiff could painlessly perform at work, and allegedly provided USPS with a pretext for excluding him from the workplace in February 1997. *See infra*.

protect postal employees from retaliation, and urged the plaintiff to request USPS to conduct an internal investigation. Without seeking Morales's consent, OSHA forwarded his file to the Postal Service, thereby confirming to USPS that plaintiff was in fact the whistle-blower. From that point on, the retaliation and discrimination directed at plaintiff worsened considerably. Morales alleged that in December 1996 he was victimized by episodes of name-calling and bullying, and later that month he was suspended one week for violating a new uniform policy instituted by Lopez. In January 1997, a postal employee poured sugar into the gas tank of plaintiff's car, nearly resulting in a traffic accident. On at least three occasions in February, plaintiff's supervisor dismissed him from work without pay because "there was no work available for him." Finally, on February 20, 1997, plaintiff was transferred from the Caparra Heights station to the General Post Office in San Juan. Morales alleges that he was removed from the Caparra Heights station because co-workers accused him of being "a safety hazard and a homosexual."

These events prompted Morales to file four Equal Employment Opportunity (EEO) complaints with the USPS.[3] Plaintiff filed his first precomplaint on

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[3] The EEO complaint process provides an administrative forum for postal employees to resolve discrimination claims against the USPS. Postal workers alleging discrimination are required to file a "precomplaint" and consult with an EEO counselor. If the matter raised in the precomplaint is not resolved within the established 30-day counseling period, the employee is authorized to file a formal EEO complaint. Once the formal complaint is filed, USPS is compelled to take action within a specified time period. After this period expires, the employee is

February 15, 1996, in the aftermath of USPS's decision to alter the allotted days off for the available distribution and window clerk position. His second EEO precomplaint, submitted April 25, 1996, alleged that a new coffee and lunch break policy instituted at the Caparra Heights station unfairly discriminated against male postal employees. After the USPS failed to respond to his first precomplaint, Morales filed a formal EEO complaint on April 3, 1996, alleging that USPS unlawfully retaliated against him by posting the available window clerk position with Thursday/Sunday rest days rather than Saturday/Sunday rest days. He subsequently filed a second formal EEO complaint on September 5, 1996, citing the discriminatory break policy and another episode of retaliation. Plaintiff finally left the employ of the USPS in early September 1997, allegedly as the result of a constructive discharge.

B. Events underlying the claims against APWU

In 1991, long before the events at issue here, Morales had been appointed shop steward of the Caparra Heights station by defendant Soto's predecessor, but was removed shortly thereafter for reasons that are unclear. Six years later, the Union elected Soto as its new president, and Morales petitioned him repeatedly for a second tour as shop steward. Soto capitulated, appointing Morales to the position on January 17, 1997. However, plaintiff's

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permitted to file suit in United States District Court. *What You Need to Know About EEO*, Publication 133, November 1999, http://www.postaleeo.com.

tenure ended abruptly three weeks later after Soto received complaints that Morales was acting inappropriately toward co- workers, and abusing his union status to avenge himself on USPS management.

Morales alleges that his dismissal as union shop steward was motivated by a conspiracy between USPS and APWU to remove him from his job at the Caparra Heights station, in violation of the Union's bylaws. Plaintiff also claims that the Union failed to process his grievances arising from two February 1997 dismissals from work, or take any action with respect to his constructive discharge.

II.

Morales filed an amended complaint consolidating his numerous allegations of wrongdoing into four counts. Count I, entitled "Retaliation and Discrimination," alleges that USPS unlawfully retaliated against plaintiff for filing OSHA claims, EEO complaints, and unfair labor practice charges. Count II, entitled "Conspiracy," accuses the USPS and APWU of "conspiring against Plaintiff to cause his removal as Caparra Heights Shop Steward and later on his removal from Caparra Heights Station." Count III alleges 1) that USPS violated the collective bargaining agreement ("CBA"), and 2) that APWU breached its duty of fair representation "by arbitrarily, capriciously, in bad faith and/or invidiously failing to process timely Plaintiff's grievances through [USPS's] grievance procedure." Finally, Count IV claims intentional infliction of emotional distress arising from the "outrageous acts

and omissions, retaliatory conduct, and discrimination" perpetrated by USPS and APWU.

As a preliminary matter, plaintiff's failure to cite any statutory basis for relief in his amended complaint complicates our review of his claims. However, under the liberal "notice pleading" requirements of *Rule 8 of the Federal Rules of Civil Procedure*, this deficiency is not fatal to plaintiff's case:

> A complaint need not point to the appropriate statute or law in order to raise a claim for relief under *Rule 8* . . . . [A] complaint sufficiently raises a claim even if it points to no legal theory or even if it points to the wrong legal theory as a basis for that claim, as long as relief is possible under any set of facts that could be established consistent with the allegations.

Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992) (internal quotation marks omitted); *see Fitzgerald v. Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989)*; *see also Simonton v. Runyon, 232 F.3d 33, 36-37 (2d. Cir. 2000)*. These omissions do, however, create an ambiguity as to whether Morales's claims arise solely under the anti-discrimination clause of the CBA,[4] or whether plaintiff also intended to plead

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[4] Under Article 2, Section 1 of the CBA:

> The Employer and the Union agree that there shall be no discrimination by the

a cause of action under *Title VII of the Civil Rights Act of 1964*.

This query is not academic -- while the protections built into the CBA parallel those of Title VII, the two remedial schemes contain discrete exhaustion requirements that may bar their availability to plaintiff as sources of relief. Appellees urge us to find that Morales's amended complaint relied entirely on the CBA, and failed to allege properly a Title VII claim. That contention ignores both the substance and structure of Morales's amended complaint. Not only is the complaint replete with references to plaintiff's EEO initiatives, *see infra* note 5, but the retaliation and discrimination claims are set forth in a separate count to distinguish them from Morales's claims for violations of the CBA. Moreover, Morales cited to Title VII both in his opposition to summary judgment and in his appellate brief. Therefore, we believe the more prudent course is to broadly construe the allegations in plaintiff's amended complaint as alleging a cause of action under both the CBA and Title VII. *See Fed. R. Civ. P. 8(f)* ("All

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> Employer or the Union against employees because of race, color, creed, national origin, sex, age, or marital status. In addition, consistent with other provisions of this agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the *Rehabilitation Act*.

Collective Bargaining Agreement between American Postal Workers Union, AFL-CIO, and U.S. Postal Service; November 21, 1994 - November 20, 1998.

pleadings shall be so construed as to do substantial justice."); *Foster Med. Corp. Employees' Pension Plan v. Healthco, Inc., 753 F.2d 194, 197 (1st Cir. 1985).*[5] With this approach in mind, we turn to the counts of the amended complaint.

III.

A. Breach of Collective Bargaining Agreement

In accepting the recommendations of the magistrate judge, the district court properly characterized Count III of Morales's amended complaint as advancing a "hybrid breach of contract

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[5] On facts similar to these, the Seventh Circuit broadly construed the plaintiff's complaint to invoke Title VII as a basis for relief:

> Although Brown's complaint does not invoke Title VII as a basis for her claim explicitly, it does indicate that an EEOC charge had been made and that the complaint was filed within ninety days after receiving an EEOC right to sue letter . . . The reference in Brown's complaint to EEOC procedures did give the defendants some notice that she was pursuing a federal Title VII action . . . Though inartfully drafted, we are hesitant to judge Brown's complaint so narrowly as to foreclose the full adjudication of her claim on the mere failure to cite Title VII explicitly.

Brown v. Reliable Sheet Metal Works, Inc., 852 F.2d 932, 933 n.1 (7th Cir. 1988), overruled on other grounds, *Donnelly v. Yellow Freight System, Inc., 874 F.2d 402 (7th Cir. 1989).*

and fair representation claim." The Supreme Court has observed that

> such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on *§ 301* [of the Labor Management Relations Act], since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the *National Labor Relations Act. Yet the two claims are inextricably inter-dependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.*

DelCostello v. Int'l Broth. of Teamsters, 462 U.S. 151, 164-65, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983) (internal citations and quotation marks omitted) (emphasis added); *see also Local No. 391 v. Terry, 494 U.S. 558, 563-64, 108 L. Ed. 2d 519, 110 S. Ct. 1339 (1990); Fant v. New Eng. Power Serv. Co., 239 F.3d 8, 14 (1st Cir. 2001).* The dual requirements for alleging a "hybrid claim" are predicated on the theory that an employee working under a CBA is ordinarily required to exhaust the grievance procedures provided in that agreement before bringing suit. *DelCostello, 426 U.S. at 163.* A rigid exhaustion

requirement, however, works an injustice to the employee "when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation." *Id. at 164.* Under these circumstances, an employee who has not exhausted the grievance procedures outlined in the CBA may nonetheless file suit against the employer if he can demonstrate that the union breached its duty of fair representation, such that the grievance procedures mandated by the CBA provided no meaningful recourse. *Id.*

Courts conduct a tripartite inquiry to determine whether a union breached its duty of fair representation so materially as to render the CBA's grievance procedures inadequate. "The three separate levels of inquiry . . . are as follows: (1) did the union act arbitrarily; (2) did the union act discriminatorily; or (3) did the union act in bad faith." *Ooley v. Schwitzer Div., Household Mfg. Inc., 961 F.2d 1293, 1302 (7th Cir. 1992)* (citing *Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 71-76, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991)).* "In order to successfully defend against a motion for summary judgment on a duty of fair representation claim, the plaintiff must point the court to record evidence supporting any one or all of these elements." *Griffin v. Air Line Pilots Ass'n, Int'l, 32 F.3d 1079, 1083 (7th Cir. 1994).* The Supreme Court has stressed that our evaluation of any such evidence must be "highly deferential" to the union. *O'Neill, 499 U.S. at 78* (quoting *Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 97 L. Ed. 1048, 73 S. Ct. 681 (1953)).*

The deference accorded unions defending hybrid claims imposes a heavy burden on employees like Morales alleging a breach of the duty of fair representation. Against this backdrop, the district court did not err in its determination that Morales's submissions failed to provide the requisite record evidence of "irrational" union activity falling "outside a wide range of reasonableness." *Id.* Plaintiff's amended complaint and opposition to summary judgment instead raise bare allegations that APWU 1) violated its bylaws by perfunctorily dismissing him from his position as shop steward, and 2) unduly delayed or failed to process "several of plaintiff's grievances." In response, APWU's motion for summary judgment references specific provisions in the Union's bylaws authorizing the Union president to dismiss a shop steward without providing any prior process.[6] The exhibits appended to APWU's summary judgment motion also include letters to Morales meticulously documenting the progression of his various grievances against USPS, and reflect that APWU had previously sought and obtained time extensions from USPS to ensure that any grievances that were delayed were not defaulted.

In short, after reviewing the summary judgment record, we conclude that Morales failed to proffer sufficient evidence that the Union breached its duty

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[6] APWU's bylaws do permit deposed shop stewards to file a written appeal within fifteen days of their removal, and provide that "The Board of Directors will make a full investigation on the work place or Installation and render a written decision within 15 days" of receiving the appeal. There is no indication that Morales ever availed himself of this option.

of fair representation by acting arbitrarily, discriminatorily, or in bad faith. *O'Neill, 499 U.S. at 76-77.* Consequently, plaintiff fails to satisfy the first of the dual hybrid claim requirements, *see DelCostello, 426 U.S. at 163*, and we need not separately assess Morales's allegations that USPS violated the CBA.

B. Retaliation and Discrimination under Title VII

Adopting the recommendation of the magistrate judge, the district court concluded that Morales's retaliation and discrimination claims were only actionable under the collective bargaining agreement. However, it is well settled that *Title VII of the Civil Rights Act of 1964* provides relief independent of the remedial scheme outlined in the CBA. In *Alexander v. Gardner- Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974)*, the Supreme Court concluded that

> the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.

Id. at 48-49. The *Alexander* Court accordingly ruled that plaintiffs who invoke the grievance procedures of the collective bargaining agreement do not thereby

forfeit their private right of action under Title VII. *Id. at 49.* Hence, *Alexander* and its progeny, *see Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 78-79, 142 L. Ed. 2d 361, 119 S. Ct. 391 (1998)*, support the proposition that the presence of an anti-discrimination provision in a collective bargaining agreement does not foreclose a postal employee's private right of action under Title VII.

The Seventh Circuit's decision in *Roman v. U.S. Postal Service, 821 F.2d 382 (7th Cir. 1987)*, relied upon by the district court, is not to the contrary. In *Roman*, the Postmaster of the post office where Roman worked accused him of falsifying his employment application form, and allegedly promised him a position at another postal facility if he chose to resign from his current job rather than be fired. After the Postmaster failed to deliver on this promise, Roman filed suit in federal district court alleging that USPS violated his procedural due process rights by "fraudulently inducing him to resign from his employment." *Id. at 384.* The Seventh Circuit rejected the plaintiff's argument that the Constitution itself furnished a right of action for his procedural due process claim, observing that "Congress has expressly authorized the adoption of final and binding grievance procedures in the Postal Service collective bargaining agreements." *Id. at 386* (quoting *Ellis v. U.S. Postal Service, 784 F.2d 835, 839-40 (7th Cir. 1980)).* Accordingly, Roman's recourse was limited to the procedural rights enshrined in that agreement:

> Roman's allegation that the Postal Service violated his due process rights in

> threatening him and forcing him to resign does not provide jurisdiction. Where Congress has created an elaborate, remedial schem which adequately and comprehensively addresses the protection of constitutional rights in the employment context, an employee whose rights are protected through that scheme cannot bring a new, *non-statutory* action.

Id. at 385-86 (emphasis added).

However, just as Congress may limit an employee's avenues of redress for certain constitutional claims by establishing "an elaborate remedial scheme" that adequately addresses such claims, it also has the power to create multiple rights of action to redress other types of employment injuries. Thus, as the Supreme Court ruled in *Alexander*, the legislative history of Title VII reflects Congress's intent to provide employees victimized by retaliation or discrimination with an additional statutory right of action wholly independent of the CBA. *Alexander, 415 U.S. at 48-49.* The district court therefore erred in concluding that the collective bargaining agreement between USPS and APWU furnished Morales's sole avenue of recourse for his retaliation and discrimination claims.

Judicial recourse under Title VII, however, is not a remedy of first resort. *See Jensen v. Frank, 912 F.2d 517, 520 (1st Cir. 1990)* ("Title VII requires exhaustion of administrative remedies as a condition precedent to suit in federal district court."). USPS's EEO Guidelines, promulgated pursuant to *42 U.S.C*

§ 2000e-5, prescribe a lengthy administrative process that plaintiffs must exhaust prior to filing a Title VII action in district court. Here, Morales argues that USPS failed to provide any formal disposition of his two formal EEO complaints within the established 180-day window, *see 29 C.F.R. § 1614.107(c)*, thereby entitling him to pursue his claims in district court. Plaintiff buttresses his assertions with two letters from USPS formally dismissing his EEO complaints. Each letter informed Morales that "if you are dissatisfied with the Postal Service's final decision in this case, you may file a civil action in an appropriate U.S. District Court . . ."

USPS argues on appeal that even if plaintiff may theoretically look outside the collective bargaining agreement to an alternative source of relief under Title VII, he forfeited his right of action by neglecting to file any EEO complaints addressing the vast majority of the discriminatory and retaliatory incidents described in the amended complaint.

We agree with USPS that Morales's Title VII cause of action is limited to those discrimination and retaliation allegations in his amended complaint that were previously the subject of a formal EEO complaint. As we read the EEO dismissal letters, this universe is limited to the following three allegations:

> (1) Morales's allegation that Job Bid # 2541417 was posted with Thursday/Sunday rest days rather than Saturday/Sunday rest days in retaliation for plaintiff's OSHA complaints

(2) Morales's allegation of sexual discrimination and retaliation arising from an April 9, 1996 incident in which plaintiff's duties and responsibilities were awarded to a female employee and he was given window clerk duties to perform

(3) Morales's allegation that the "coffee and lunch breaks" policy was not applied in an equal and nondiscriminatory matter

We reject USPS's insinuation on appeal that summary disposition of these surviving claims is appropriate at this time. While it is within our discretion to affirm the district court's entry of summary judgment on any ground revealed by the record, *Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999)*, any determination of whether Morales's Title VII claims can survive summary judgment is premature. As a consequence of the district court's erroneous presumption that Morales's claims were solely actionable under the CBA, no court has analyzed the record to determine whether Morales has raised a material dispute of fact that compels a trial on his surviving Title VII claims. Under these circumstances, we believe the preferable practice is to remand to the district court. *See United States v. Gell-Iren, 146 F.3d 827, 831 (10th Cir. 199)* ("A factual record must be developed in and addressed by the district court in the first instance for effective review."). However, Morales is precluded on remand from seeking relief for a plethora of other acts of discrimination and retaliation alleged in his

amended complaint, including the discrete acts of bullying, intimidation, and vandalism by his co-workers, his seven-day suspension for violating the USPS uniform policy, his transfer from the Caparra Heights station, his day-long "expulsions" from work in February 1997, his constructive discharge, and his internal grievances against APWU.[7]

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[7] Plaintiff's internal grievances against APWU are theoretically actionable under Title VII, which provides that "it shall be an unlawful employment practice for a labor organization to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin." *42 U.S.C. β 2000e-2(c)(1)*; *see, e.g., Thorn v. Amalgamated Transit Union, 305 F.3d 826, 831-32 (8th Cir. 2002)*. However, the district court correctly adopted the magistrate judge's determination that Morales failed to exhaust the administrative remedies provided by the Union's bylaws:

> Plaintiff should have exhausted the contractual remedies provided to him as to any claim against the Union and/or its agents which is not established as a breach of its duty of fair representation, such as his removal from shop steward position. He failed to exhaust internal union appeal process.

Consequently, Morales has forfeited any Title VII claim arising from his internal union grievances. In reaching this conclusion, we reject as untenable Morales's complaint that he was unfairly surprised by the magistrate judge's partial reliance on an exhaustion rationale for disposing of his claims against APWU. The record conclusively demonstrates that APWU put the exhaustion point at issue throughout the litigation before the magistrate judge. For this reason, the exhaustion arguments and supporting exhibits raised for the first time before the district court were inadmissible due to Morales's failure to

C. Residual Claims

Our resolution of Morales's CBA and Title VII claims disposes of his conspiracy claim. "A civil conspiracy is a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means for an unlawful purpose." *Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974)*; *see also Maryland Casualty Co. v. Hosmer, 93 F.2d 365, 366 (1st Cir. 1937)*. The only predicate acts cited in the amended complaint that possibly establish a basis for conspiracy liability are 1) APWU's removal of plaintiff as shop steward, 2) USPS's decision to transfer plaintiff out of the Caparra Heights station, and 3) plaintiff's alleged constructive discharge. We have concluded, however, that Morales failed to preserve a right of action for any of these three alleged offenses. Morales's surviving Title VII claims, *see supra*, implicate only unilateral decisions or policies of USPS that cannot form the gravamen of a civil conspiracy claim. *See Ammlung, 494 F.2d at 814*.

With regard to Morales's emotional distress claim, even assuming the truth of the surviving Title VII allegations, USPS's conduct does not rise to the level of "extreme and outrageous," "beyond all possible bounds of decency," or "utterly intolerable in a civilized community." *Santiago-Ramirez v. Sec'y of*

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present these materials to the magistrate judge. *See Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 991 (1st Cir. 1988)* ("Systemic efficiencies would be frustrated and the magistrate's role reduced to that a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round.").

Dept. of Defense, 62 F.3d 445, 448 (1st Cir. 1995). Consequently, plaintiff's intentional infliction of emotional distress claim fails as a matter of law.

IV.

We affirm the judgment entered for defendants on counts II, III, and IV of Morales's amended complaint. We vacate the judgment entered on count I and remand for proceedings not inconsistent with this decision. All parties shall bear their own costs.

So ordered.

APPENDIX G
STATUTE
42 U.S.C. § 2000e-5 (2010)

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this *title [42 USCS §§ 2000e-2* or *2000e-3*].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the

alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far

as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially

instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this *title [42 USCS §§ 2000e* et seq.] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3) (A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this *title [42 USCS §§ 2000e* et seq.], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including

each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (*42 U.S.C. 1981a*), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government,

governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person

claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in

accordance with *rule 65 of the Federal Rules of Civil Procedure.* It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this *title [42 USCS §§ 2000e* et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the

case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to *rule 53 of the Federal Rules of Civil Procedure.*

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim

earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [*42 USCS § 2000e-3(a)*].

(B) On a claim in which an individual proves a violation under section 703(m) [*42 USCS § 2000e-2(m)*] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

APPENDIX H
STATUTE
42 U.S.C. § 2000e-16 (2010)

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in *section 102 of title 5, United States Code*, in executive agencies as defined in *section 105 of title 5, United States Code* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity

programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an

appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 [*42 USCS § 2000e* note] or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [*42 USCS § 2000e-5*], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions. The provisions of section 706(f) through (k) [*42 USCS §§ 2000e-5(f)*-(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[.]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in

employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 [*42 USCS § 2000e* note] relating to equal employment opportunity in the Federal Government.

(f) Application of Lilly Ledbetter Fair Pay Act. Section 706(e)(3) [*42 USCS § 2000e-5(e)(3)*] shall apply to complaints of discrimination in compensation under this section.

APPENDIX I

REGULATIONS

29 C.F.R. § § 1614.106 (1996)

§ 1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgment shall also advise the complainant that:

(1) The complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period.